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MULTI-TEXTUAL CONSTITUTIONS

*Richard Albert**

We have long been taught that constitutions are either "written" or "unwritten." But this binary classification is wrong. All constitutions are in some way written, and all constitutions contain unwritten rules. This false distinction moreover overlooks the most important formal difference among the constitutions of the world: some constitutions consist of a single, supreme document of higher law while others consist of multiple documents, each enacted separately with shared supremacy under law. Ubiquitous but so far unnoticed, these constitutions comprising multiple texts are a unique constitutional form that has yet to be studied and theorized. I call them multi-textual constitutions.

This Article is the first on multi-textuality as a constitutional form. I draw from current and historical constitutions in Africa, the Americas, Asia, Europe, and Oceania to explain, illustrate, and theorize the design and operation of multi-textual constitutions. I examine their origins, compare how they perform relative to the alternative uni-textual constitutional form, and outline a research agenda for further study. What results is a reordering of our basic constitutional categories, a deep analytical dive into a distinct constitutional form, and a disruptive revelation about the United States Constitution, the world's paradigmatic model of a uni-textual constitution.

* William Stamps Farish Professor in Law, Professor of Government, and Director of Constitutional Studies, The University of Texas at Austin. I thank audiences at Airlangga University (Indonesia); Escuela Libre de Derecho (Mexico); Externado University (Colombia); FGV Direito SP (Brazil); Maharashtra National Law University Mumbai (India); New York Law School; Sapir College (Israel); Texas A&M University; Titu Maiorescu University (Romania); Touro Law School; Universidad Femenina del Sagrado Corazón (Peru); Universidad Monteávila (Venezuela); Universidad de Especialidades Espíritu Santo (Ecuador); Universidade Católica Portuguesa (Portugal); Universidade Federal de Minas Gerais (Brazil); Université Paris-Panthéon-Assas (France); University of Alberta (Canada); University of California, Irvine; City, University of London (United Kingdom); University of Maryland; University of Ottawa (Canada); University of Tehran (Iran); the University of Texas at Austin; and Victoria University of Wellington (New Zealand) for helpful feedback on the ideas developed in this Article. My thanks also to David Anders, Biruktawit Assefa, Sydney Eisenberg, Haley Gorman, Hunter Heck, Valerie Listorti, Casey Schmidt, Mary Triplett, Hana Verwilt, and the editors of the *Virginia Law Review* for their excellent editorial assistance.

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INTRODUCTION: BEYOND WRITTEN AND UNWRITTEN CONSTITUTIONS

For generations, the study of constitutional law has begun with a standard distinction: some constitutions are "written" while others are "unwritten."[1] According to this traditional contrast, written constitutions exist on parchment in documentary form, while unwritten constitutions are intangible sets of invisible rules consisting of norms, principles, and practices that sustain the constitutional order without entrenchment in written word.[2] This foundational distinction has been the basic building block in constitutional studies. But it is both incorrect and misleading.

[1] See Michael Foley, The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government 3 (1989) ("One of the most traditional points of departure in the study of constitutions has been to classify them according to whether they are 'written' or 'unwritten.'"); Andrew Heywood, Politics 293 (2d ed. 2002) ("Traditionally, considerable emphasis has been placed on the distinction between written and unwritten constitutions."); Herbert W. Horwill, The Usages of the American Constitution 1 (1925) ("Once upon a time some unknown humorist divided constitutions into written and unwritten, and since then text-book after text-book has taken his classification seriously. The American Constitution, we are told, is an example of the former class and the English of the latter."); see also A.V. Dicey, Introduction to the Study of the Law of the Constitution 3–6 (3d ed. 1889) (distinguishing written and unwritten constitutions on several grounds, including how to locate them and how to identify their constitutive rules); Paul Craig, Written and Unwritten Constitutions: The Modality of Change, *in* Pragmatism, Principle, and Power in Common Law Constitutional Systems 263, 263 (Sam Bookman, Edward Willis, Hanna Wilberg & Max Harris eds., 2022) (describing written constitutions as "the norm" and unwritten constitutions as "the rare exception"); James Allan, Against Written Constitutionalism, 14 Otago L. Rev. 191, 191–93 (2015) (observing that "[m]ost of the democratic world has some sort of written constitution" while at most three democracies have an "unwritten constitution," namely Israel, New Zealand, and the United Kingdom).

[2] See, e.g., W.J. Cocker, The Government of the United States 55 (1889) ("Constitutions are either written or unwritten. A written constitution is a body of laws, contained in a written document, under which the government is conducted. The Constitution of the United States is an example. . . . An unwritten constitution is one having no definite form. The English constitution is an example."); Lucius Hudson Holt, The Elementary Principles of Modern Government 26 (1923) ("A constitution may be written or unwritten. It may be a single document, like the constitution of the United States, or it may be a combination of legal precedent, individual bills and grants, and immemorial customs, like the constitution of England."); John Alexander Jameson, A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding 77 (4th ed. 1887) ("An unwritten Constitution is

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The distinction between written and unwritten constitutions is incorrect because all constitutions are in some way written. Even parts of the paradigmatically "unwritten" Constitution of the United Kingdom are written somewhere, namely in statutes that are endowed with constitutional status,[3] for instance the Magna Carta,[4] the Bill of Rights,[5] and the Human Rights Act.[6] It is more accurate to describe an "unwritten" constitution as partly codified and partly uncodified, since many of its constitutional norms appear in official texts.

The familiar distinction between written and unwritten constitutions is moreover misleading because all constitutions contain unwritten rules. No constitution is ever fully written, and one might well wonder whether it is possible for a constitution to be set out entirely in documentary form.[7] Even the United States Constitution—the archetypical "written" constitution—consists of "a constitution outside the constitution,"[8] a common reference to the extra-canonical norms, practices, relationships, and institutions that form part of the constitution beyond its text. Scholars have properly recognized that the U.S. Constitution is comprised of various "invisible"[9] elements, and they have even inquired whether and how it might be possible to amend America's unwritten constitution.[10]

made up largely of customs and judicial decisions, the former more or less evanescent and intangible . . . . Not so with written Constitutions."); Emlin McClain, Constitutional Law in the United States 11 (1905) ("If the body of rules and principles is not reduced to definite and authoritatively written form, the constitution is said to be unwritten, as in the familiar case of Great Britain.").

[3] See Thoburn v. Sunderland City Council [2002] EWHC (Admin) 195 [62], [2003] QB 151 (Eng.) (enumerating statutes that have constitutional status).

[4] Magna Carta 1297, 25 Edw. 1 c. 9 (Eng.).

[5] Bill of Rights 1688, 1 W. & M. c. 2 (Eng.).

[6] Human Rights Act 1998, c. 42 (UK).

[7] See John Gardner, Can There Be a Written Constitution?, *in* 1 Oxford Studies in Philosophy of Law 162, 188–92 (Leslie Green & Brian Leiter eds., 2011).

[8] See Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 410–14 (2007).

[9] Laurence H. Tribe, The Invisible Constitution 25–27 (2008). Similar themes appear in relation to works on the "unwritten" Constitution of the United States. See Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By, at ix–x (2012); Don K. Price, America's Unwritten Constitution: Science, Religion, and Political Responsibility 9 (1983).

[10] See Richard Albert, Ryan C. Williams & Yaniv Roznai, Introduction: A Return to Constitutional Basics: Amendment, Constitution, and Writtenness, *in* Amending America's Unwritten Constitution 1, 14–16 (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022).

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This false distinction between written and unwritten constitutions comes at a great cost. It overlooks and obscures the most important formal distinction among the constitutions of the world: some constitutions consist of a single, supreme document of higher law while others consist of multiple documents, each enacted separately with shared supremacy under law. In jurisdictions governed by more than one document of higher law, the constitution is composed of more than one self-standing text of equal legal force, and together those texts are regarded jointly as the supreme law of the land.[11] The documents comprising these constitutions are enacted separately in a variety of forms, for instance, as founding constitutional texts, organic laws endowed with constitution-level status, and constitutional amendments promulgated as separate documents.

Ubiquitous yet so far unidentified, this constitutional form defies our conventional understanding of "written" constitutions. Rather than one official text, there are many, and no single text prevails over another because all are considered equal. These constitutions are therefore unlike *uni-textual* constitutions whose written elements appear in a single document that is treated as the only supreme law of the land. I call them *multi-textual* constitutions. Multi-textual constitutions differ from single-text constitutions on the major markers of constitutional life: their initial design, their ongoing evolution, their authoritative interpretation, and their formal amendment. Multi-textual constitutions moreover raise intriguing possibilities for governance in relation to democracy, human rights, and the rule of law that set them apart from what is regarded as the world's dominant model of uni-textual constitutions.[12]

There are advantages to introducing "multi-textual constitutions" as a term and category in the field of public law generally and constitutional studies specifically. Using "multi-textual" as a new term to identify this unique classification of constitutions brings a much-needed correction to the mistaken identification of constitutions as "unwritten." In addition, using "multi-textual" as a new category for constitutions distinguishes them in both form and function from the alternative uni-textual model.

[11] In this Article, I focus only on multi-textual national constitutions, but multi-textual constitutions exist also at the subnational and supranational levels.

[12] See Denis J. Galligan & Mila Versteeg, Theoretical Perspectives on the Social and Political Foundations of Constitutions, *in* Social and Political Foundations of Constitutions 3, 6 (Denis J. Galligan & Mila Versteeg eds., 2013) (observing that "the standard practice across the nations of the world, with just a few exceptions, is to have a single written constitutional document").

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Scholars have yet to identify, explain, and theorize multi-textuality as a distinctive constitutional form despite its prevalence in every region of the world, across all legal traditions, and in all types of constitutional states no matter their age. My purpose in this Article is to introduce, illustrate, and theorize multi-textuality with reference to current and historical constitutions, and to show how this ubiquitous constitutional form disrupts much of what we know about constitutions, including the U.S. Constitution. The great revelation is that the U.S. Constitution consists of multiple documents of higher law, each equally supreme in the constitutional order. Yet, as I will show, although the U.S. Constitution satisfies the trio of legal criteria to be defined in form and operation as multi-textual, it fails the sociological test of public recognition as multi-textual because it is perceived in law and society as uni-textual.

I begin, in Part I, by showing the remarkable omnipresence of multi-textual constitutions in the world. I draw from many constitutional traditions to show the prevalence of multi-textuality in countries rooted in civil and common law traditions, with parliamentary and presidential systems, and in the Global North and South. I furthermore show that multi-textual constitutions are created in one of two ways: either by express design or by unplanned evolution. In Part II, I identify problems created by multi-textual constitutions in connection with three basic questions that are not ordinarily asked of uni-textual constitutions: (1) what is the constitution?, (2) where is the constitution?, and (3) when does a set of legal rules becomes constitutional? Part III then turns to the potential promise of multi-textuality. I highlight three areas of strength for multi-textual constitutions: (1) they make possible incremental constitutional development as a constitutional state begins the transition from one regime to another; (2) they make available multiple options for constitutional reform and may therefore offer more flexibility in managing changes to higher law; and (3) they may help forestall the rise of a popular obsession with the constitution, what scholars have diagnosed as "veneration," a problematic phenomenon traceable to James Madison,[13] one of the authors of the U.S. Constitution. I close with a research agenda for future study to enhance our understanding of both uni-textual and multi-textual constitutions.

[13] See The Federalist No. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

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I. MULTI-TEXTUALITY IN THE WORLD

When we visualize the United States Constitution in our minds, we picture a single, unified, supreme document of higher law. But imagine the U.S. Constitution were not one document. Imagine instead it consisted of several documents of equal supremacy under law. In this alternative universe, speaking of "the Constitution" would no longer refer *only* to the official constitutional text written in 1787. It would now refer both to that document and to other official texts enacted and popularly recognized as comprising the essential documents of "the U.S. Constitution."[14]

Reimagining the architecture of the U.S. Constitution in this way raises pivotal questions about the form and function of written constitutions. What challenges and opportunities would this new configuration of constitutional texts create for the United States? How would we distinguish "constitutional" documents from others? Would this new constitutional form require new modes of constitutional interpretation? How would amendments be made? And would the Constitution remain a vaunted source of national pride? These questions open a window into the

[14] Other official texts might include the Declaration of Independence, the Emancipation Proclamation, and the Northwest Ordinance. I suggest these documents only as illustrative possibilities, given their special treatment in American law and society. For instance, the U.S. Supreme Court has cited the Declaration of Independence with some frequency. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856); Smith v. Turner, 48 U.S. (7 How.) 283, 440 (1849); United States v. The Amistad, 40 U.S. (15 Pet.) 518, 556–57 (1841); see also Alexander Tsesis, The Declaration of Independence and Constitutional Interpretation, 89 S. Cal. L. Rev. 369, 378–84 (2016) (chronicling Supreme Court references to the Declaration of Independence). The Emancipation Proclamation and the Northwest Ordinance are commonly presented to students as founding documents. See, e.g., Cal. Educ. Code § 33540(b)(4) (Deering Supp. 2023) ("Ensure the following historical documents are incorporated into the framework: (A) The Declaration of Independence. (B) The United States Constitution, including the Bill of Rights. (C) The Federalist Papers. (D) The Emancipation Proclamation. (E) The Gettysburg Address. (F) George Washington's Farewell Address."); Ohio Rev. Code Ann. § 3301.079(A)(1)(b) (LexisNexis Supp. 2023) ("[T]he state board shall incorporate into the social studies standards for grades four to twelve academic content regarding the original texts of the Declaration of Independence, the Northwest Ordinance, the Constitution of the United States and its amendments, with emphasis on the Bill of Rights, and the Ohio Constitution, and their original context."); Va. Code Ann. § 22.1-201 (2021) ("To increase knowledge of citizens' rights and responsibilities thereunder and to enhance the understanding of Virginia's unique role in the history of the United States, the Declaration of American Independence, the general principles of the Constitution of the United States, including the Bill of Rights, the Virginia Statute of Religious Freedom, the charters of the Virginia Company of April 10, 1606, May 23, 1609, and March 12, 1612, and the Virginia Declaration of Rights shall be thoroughly explained and taught by teachers to pupils in public elementary, middle, and high schools.").

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symbolic, infrastructural, and operational differences between uni-textual and multi-textual constitutions.

Multi-textual constitutions are all around us. They are far from rare, yet their features and origins remain widely unknown. In this Part, I introduce the basic and distinctive legal features of multi-textual constitutions in contrast to the alternative uni-textual model. I then examine the two ways multi-textual constitutions may be created. First, by design: constitutional designers may choose self-consciously to create a multi-textual constitution at the moment of constitutional enactment. And second, by evolution: a constitution may become multi-textual by necessity or convenience over time, despite having been framed by design as a uni-textual constitution. The purpose of this Part is to establish a vocabulary for distinguishing uni-textual from multi-textual constitutions.

A. Features of Multi-Textuality

Three basic legal features distinguish multi-textual constitutions from uni-textual constitutions: (1) multiplicity; (2) asynchrony; and (3) shared supremacy. Multi-textual constitutions do not always reflect all three features in the same manner and form. But these three basic features are core to multi-textuality. The special properties of multi-textual constitutions do not make them better or worse than uni-textual ones. But they do produce unique problems and possibilities for the operation of multi-textual constitutions. In this Section, I illustrate these three basic features of multi-textuality with reference to constitutions in Austria, New Zealand, and Sweden.

1. Multiplicity

The first distinguishing legal feature of multi-textual constitutions is multiplicity. Unlike uni-textual constitutions, multi-textual constitutions consist of more than one document of higher law. Consider the Constitution of New Zealand. It consists of the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Electoral Act 1993, the Public Finance Act 1989, and the Treaty of Waitangi, among many other texts recognized as part of the written components of the Constitution.[15]

[15] In an authoritative book on the New Zealand Constitution, two leading scholars have observed of the Constitution that "practitioners and commentators think of it as 'unwritten' although its contents are found in various written sources." Matthew S.R. Palmer & Dean R. Knight, The Constitution of New Zealand: A Contextual Analysis 1 (2022); Matthew S.R.

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The Constitution Act 1986 outlines the powers of the executive, legislative, and judicial branches of government,[16] and includes an appended schedule listing the many statutes enacted as amendments to it.[17] The New Zealand Bill of Rights Act 1990 enumerates human rights and fundamental freedoms, including those relating to democracy, nondiscrimination, and criminal defense.[18] The Electoral Act 1993 codifies a reform to the electoral system from the traditional commonwealth model of first-past-the-post to a modern system of proportional representation.[19] The Public Finance Act 1989 consolidates rules on finance, including official expenditures and borrowing.[20] The Treaty of Waitangi established a constitutional relationship between the Māori and the Crown.[21] Other texts with constitutional status include the Magna Carta, the Act of Settlement 1700, and the Bill of Rights 1688, just three of the imperial enactments from the United Kingdom that have direct application in New Zealand.[22] These and other documents of higher law make up the written parts of the Constitution. This reflects the common feature of multiplicity in multi-textual constitutions.

2. Asynchrony

The second distinguishing legal feature of multi-textual constitutions is asynchrony. The various documents of higher law in a multi-textual jurisdiction are not necessarily adopted at the same moment. They may be adopted as separate enactments over the life of a constitutional state. There is no defined interval at which separate enactments may come into force, nor are there rules requiring a specific sequence of enactment. These higher laws are enacted serially when they are adopted, according to no particular schedule, as driven by the needs and forces of the time.

Consider the Constitution of Austria. It authorizes the national legislature to make two kinds of reforms that illustrate how multiplicity and asynchrony distinguish multi-textual constitutions from uni-textual

Palmer, What Is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders, 17 Pub. L. Rev. 133, 142–45 (2006).

[16] Constitution Act 1986, ss 6–24 (N.Z.).

[17] Id. sch 1.

[18] New Zealand Bill of Rights Act 1990, ss 8–27.

[19] Electoral Act 1993, s 2 (N.Z.); Electoral Act 1956, s 116(1) (N.Z.).

[20] Public Finance Act 1989, s 1A (N.Z.).

[21] Treaty of Cession Between Great Britain and New Zealand (Treaty of Waitangi), Gr. Brit.-Tribes of N.Z., Feb. 6, 1840, 89 Consol. T.S. 473.

[22] Imperial Laws Application Act 1988, s 3(1) (N.Z.); id. sch 1.

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constitutions. First, the national legislature may enact constitutional amendments to alter the text of any of the documents that together comprise the Constitution.[23] Second, the national legislature may also enact "constitutional laws" that will exist separately from the other documents recognized at the time as forming the Constitution of Austria.[24] These constitutional laws are both similar to and different from constitutional amendments. They are similar insofar as constitutional laws and constitutional amendments are to be enacted using the same procedure.[25] But these two types of reforms differ in their codification. Constitutional amendments are alterations made to the existing text of the documents recognized as comprising the Constitution, while constitutional laws are enacted as self-standing higher laws that will exist as new documents alongside the current documents that together are recognized as part of the Constitution. There have been several constitutional laws enacted in Austria since the Constitution came into force in 1920. Examples include a constitutional law eliminating racial discrimination in 1973,[26] another authorizing accession to the European Union,[27] and still another in 1947 prohibiting national socialism.[28] Each of these constitutional laws was enacted asynchronously, at its own pace, and without any requirement of contemporaneity with other higher laws in the country.

[23] Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as amended, Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl I No. 85/2022, art. 44, ¶ 1, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf [https://perma.cc/TC2H-47JE] (Austria).

[24] Id.

[25] Id. (specifying that constitutional laws and constitutional provisions (i.e., amendments) "can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast").

[26] Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung [Federal Constitutional Act on Elimination of Racial Discrimination] Bundesgesetzblatt [BGBl] No. 390/1973, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1973_390/ERV_1973_390.pdf [https://perma.cc/N3PE-AH6L] (Austria).

[27] Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union [Federal Constitutional Act on the Accession of Austria to the European Union], Bundesgesetzblatt [BGBl] No. 744/1994, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001317 [https://perma.cc/SJK7-CSVU] (Austria).

[28] Verbotsgesetz 1947 [National Socialism Prohibition Act 1947], BGBl No. 25/1947, as amended, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207 [https://perma.cc/WH4T-K5XE] (Austria).

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3. Shared Supremacy

The third basic legal feature of multi-textual constitutions is shared supremacy. To understand this feature, we must begin with its converse. In the standard operation of a uni-textual constitution, the single document known as the constitution stands above all other domestic laws in the jurisdiction. This lone constitutional document is supreme, and all other laws are inferior to it.[29] This is a model of exclusive supremacy: in the constitutional hierarchy of uni-textual regimes, there is one single authoritative document of higher law. As a consequence of this exclusive supremacy, a law is invalid to the extent of any inconsistency with this lone higher law in a uni-textual regime.

By contrast, constitutions operate differently in multi-textual regimes. Unlike the model of exclusive supremacy in uni-textual regimes, multi-textual regimes adhere to a model of shared supremacy under which there is more than one higher law at the top of the constitutional pyramid. In multi-textual regimes, the multiple documents of higher law are by default situated at the same elevated level of constitutional superiority. These higher laws at the summit of the constitutional order share supremacy under law. None automatically trumps another, unlike in a uni-textual regime where one supreme document occupies the entire field of higher law. In Sweden, for example, the Constitution consists of four fundamental laws, each equally supreme across the regime: the Instrument of Government, which details the form of government;[30] the Act of Succession, which regulates succession to the throne;[31] the Freedom of the Press Act, which pertains to the right to disseminate and acquire information;[32] and the Fundamental Law on Freedom of Expression, which protects new forms of media.[33] Their shared supremacy in the Swedish legal order makes them prevail over any other laws that are inconsistent with them.[34]

Shared supremacy entails entrenchment, either legal or political. Absent exceptional circumstances, what makes a constitutional document legally entrenched is its immunity from ordinary repeal without recourse

[29] See, e.g., U.S. Const. art. VI, cl. 2.
[30] Regeringsformen [RF] [Constitution] (Swed.).
[31] Successionsordningen [SO] [Constitution] (Swed.).
[32] Tryckfrihetsförordningen [TF] [Constitution] (Swed.).
[33] Yttrandefrihetsgrundlagen [YGL] [Constitution] (Swed.).
[34] See Niklas Sonntag, An Introduction to Swedish Constitutional Law, 4 Vienna J. Int'l Const. L. 663, 665 (2010).

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to special procedures or thresholds of constitutional reform.[35] For instance, a set of laws could not be regarded as constitutionally supreme if it were susceptible to revision or replacement by the same procedure or threshold used to revise or replace laws that are not regarded as constitutionally supreme. The exceptional circumstances where shared supremacy does not entail legal entrenchment involve jurisdictions where legal documents have become politically entrenched: they are regarded as constitutionally special but nonetheless technically remain revisable or replaceable by ordinary legislative means.[36] The Constitution of the United Kingdom is a useful jurisdiction to illustrate this point. The Constitution does not codify special procedures for constitutional reform, but it operates nonetheless as a hierarchical legal regime insofar as it consists of both ordinary statutes and constitutional statutes.[37] These constitutional statutes do not arise by special procedures; they derive their status instead from their special treatment in politics.[38] They are therefore not formally legally entrenched against parliamentary repeal or revision, but rather informally politically entrenched in constitutional politics.[39]

B. Multi-Textuality by Design

Multi-textuality can arise either by design or evolution. In this Section, I focus on design. Constitutional designers sometimes choose to create a multi-textual constitution at the moment of constitutional enactment. They may also elect to create a multi-textual constitution at the founding with a view to consolidating all higher laws into one single document at some point in the future. There are also instances of countries choosing to transform their long-standing disaggregated documents of higher law into a single uni-textual constitution, years after the creation of their multi-textual constitution, in order to bring coherence to a constitution that may have grown unwieldy. This is the ground to be covered in this Section on how multi-textual constitutions arise by design. I discuss constitutions in Albania, Azerbaijan, Finland, Israel, Italy, and Lithuania.

[35] N.W. Barber, Why Entrench?, 14 Int'l J. Const. L. 325, 325 (2016).

[36] Id. at 327–28.

[37] See Thoburn v. Sunderland City Council [2002] EWHC (Admin) 195 [62] (Eng. & Wales).

[38] See Farrah Ahmed & Adam Perry, Constitutional Statutes, 37 Oxford J. Legal Stud. 461, 464–65 (2017).

[39] See generally Ahmed & Perry, supra note 38 (examining the rise and nature of constitutional statutes in the United Kingdom).

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1. Multi-Textual Constitution-Making

Begin with multi-textuality as a self-conscious choice of constitutional design at the founding moment. There are three models of multi-textual constitution-making worth distinguishing. First, the founding constitutional document can make clear that additional documents of higher law may lawfully be adopted; this is a multi-textual constitution-making model of authorization. Second, the founding constitutional document can contemplate the creation of additional documents of higher law but simultaneously specify that none may contradict what is promulgated as the first text; this is a multi-textual constitution-making model of conditionality, which operates as an authorization with an explicit limitation. Third, the founding constitutional document can enumerate other documents that, taken together alongside the founding text, comprise what is recognized as the "Constitution" of the state; this is the multi-textual constitution-making model of formal enumeration. We can observe these three models of multi-textual constitution-making—authorization, conditionality, enumeration—in the founding constitutional design of multi-textual jurisdictions all around the world.

Consider more closely the multi-textual constitution-making model of authorization. Italy chose to create a multi-textual constitution for itself after the Second World War. Still in force today, the 1947 Constitution authorizes two forms of constitutional engineering: constitutional amendments and constitutional laws.[40] The distinction between the two is formal: a constitutional amendment alters the founding constitutional document, whereas a constitutional law is enacted as a separate document of higher law. Although their ultimate textual form differs, each may be enacted only by using the same complex procedure that begins with its adoption in both chambers of the national legislature in two consecutive votes separated by no fewer than three months, followed by a referendum if it is requested either by one-fifth of the members of one chamber of the legislature, or five hundred thousand voters, or five Regional Councils.[41] Yet whether the Italian Constitution changes by amendment or constitutional law, the output has equal standing in law.

[40] Art. 138 Costituzione [Cost.] (It.).

[41] Id. An important qualification must be noted: no referendum is required if the amendment or constitutional law has been approved on the second vote by a two-thirds supermajority in each of the chambers of the national legislature. Id.

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In the first sixty-five years of Italy's 1947 Constitution, there were fourteen amendments and twenty separate constitutional laws,[42] the former modifying the founding document and the latter adding a new document to the body of higher law without a corresponding alteration to the 1947 document. The Constitution contemplates the creation of constitutional laws to govern rules on various subjects of law and policy, including governmental budgeting,[43] parliamentary immunity,[44] and regional amalgamation.[45] One constitutional law, for instance, sets an expiration date for transitional rules adopted in the 1947 document to help bridge the old regime and the new.[46] In Italy, then, multiple constitutional documents may lawfully be enacted, each with equal status.

The second model of multi-textual constitution-making is conditionality: authorization with explicit limitation. The critical feature of this second model of multi-textual constitution-making is the requirement that new constitutional documents created as part of "the constitution" must remain consistent with the founding document. Consider the Constitution of Azerbaijan, which authorizes constitutional amendments and constitutional laws. Constitutional amendments in Azerbaijan are understood as "[c]hanges in the Constitution"[47] and may be enacted only by referendum.[48] Constitutional laws, on the other hand, are generally understood as documentary additions to the Constitution. These require a different procedure that may be initiated by either the president or the national legislature.[49] Constitutional laws in Azerbaijan are new, self-standing constitutional documents. They may be enacted on the condition that they "shall not contradict the main text of the

[42] See Tania Groppi, Constitutional Revision in Italy: A Marginal Instrument for Constitutional Change, *in* Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA 203, 212 (Xenophon Contiades ed., 2013).

[43] Art. 81 Costituzione [Cost.] (It.).

[44] Id. art. 96.

[45] Id. art. 132.

[46] Legge constituzionale, 18 marzo 1958, n.1, G.U. Apr. 1, 1958, n.79 (It.).

[47] Azerbaycan Respublikasinin Konstitusiya [Constitution] § V, ch. XI (Azer.), *translated in* The Constitution of the Republic of Azerbaijan, President of the Republic of Azer., https://president.az/en/pages/view/azerbaijan/constitution [https://perma.cc/BPH7-QEDY] (last visited Oct. 27, 2023).

[48] Id. § V, ch. XI, art. 152. There are restrictions on the kinds of amendments that may be passed. See id. § V, ch. XI, art. 155 ("Proposals to change or delete Articles 1, 2, 6, 7, 8 and 21 of the present Constitution, and to eliminate the rights and freedoms of man and citizen set forth in its Chapter III or to limit them to a greater extent than is provided for in international treaties to which the Republic of Azerbaijan is a party, may not be put to a referendum.").

[49] Id. § V, ch. XII, art. 157.

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Constitution,"[50] a reference to the 1995 Constitution in which the authorization appears. There is, then, an explicit condition on the substantive content of constitutional laws that may be adopted as self-standing higher laws. Once these self-standing higher laws come into force as "constitutional laws," they are treated neither as sub-constitutional nor formally inferior to the founding constitutional document. They are treated as higher laws that share supremacy with the 1995 constitutional text. This is clear from the words in the Constitution, which declare expressly that "[c]onstitutional laws shall be an integral part of the Constitution."[51]

The third model of multi-textual constitution-making is formal enumeration. It applies in Lithuania, whose post-independence Constitution of 1992 was adopted as a self-standing document of higher law. The designers of the Constitution indicated in this founding text that their constitution includes more than just the 1992 document.[52] They

[50] Id. § V, ch. XII, art. 156(V).

[51] Id.

[52] Lietuvos Respublikos Kostitucija [Constitution] art. 150 (Lith.); see also Ruling on the Compliance of the Republic of Lithuania's Law on Referendums (Wording of 20 December 2018) with the Constitution of the Republic of Lithuania and the Constitutional Law, Const. Ct. Republic Lith. § 3.1 (July 30, 2020), https://lrkt.lt/data/public/uploads/2020/09/2020-07-30_kt135-n11_ruling.pdf [https://perma.cc/EQ3R-J47E] (translating Nutarimas Dėl Lietuvos Respublikos Referendumo Įstatymo (2018 M. Gruodžio 20 D. Redakcija) Atitikties Lietuvos Respublikos Konstitucijai Ir Konstituciniam Įstatymui, No. KT135-N11/2020, 3(59) Konstitucinė Jurisprudencija 84, § 3.1 (July 30, 2020), https://lrkt.lt/data/public/uploads/2021/10/jurisprudencija-nr.-3-59-2020-web.pdf [https://perma.cc/L68A-27Z9]) ("The constitutional laws (constitutional acts) indicated in Article 150 of the Constitution, which form a constituent part of the Constitution, are different from other constitutional laws referred to in the Constitution in that the constitutional laws (constitutional acts) indicated in Article 150 of the Constitution have the legal force of the Constitution itself and they are adopted and altered under the same procedure as the Constitution itself.").

In addition, the Lithuanian Constitutional Court has in a recent judgment identified additional documents as "pre-constitutional constituent (restorative) acts" that are "primary sources of Lithuanian constitutional law":

> To sum up, it should be emphasised that, from the point of view of the Constitution of 25 October 1992, the fundamental constitutional acts of the State of Lithuania—the Resolution of the Council of Lithuania of 16 February 1918 – the Act of Independence (along with the Resolution of the Constituent Assembly (Seimas) of 15 May 1920 on the re-established democratic State of Lithuania), the Act of the Supreme Council of the Republic of Lithuania of 11 March 1990 on the Re-establishment of the Independent State of Lithuania, and the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949—are pre-constitutional constituent (restorative) acts, adopted by the supreme institutions that represented the People and expressed the will of the People to establish (restore) the independent democratic State of Lithuania.

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specified that it includes additional documents of higher law, each of which is enumerated in the 1992 document as additional and equal parts of the Constitution: (1) the Constitutional Law "On the State of Lithuania" of 11 February 1991; (2) the Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions" of 8 June 1992; and (3) the Law "On the Procedure for the Entry into Force of the Constitution of the Republic of Lithuania" of 25 October 1992.[53] Today, the Lithuanian Constitution enumerates one additional document with the same constitutional status: the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" of 13 July 2004.[54] Just like the other four documents that comprise the Lithuanian Constitution, this new Constitutional Act is treated as an equal-in-force supplement to the higher law enacted in 1992. This model of formal enumeration makes clear what has "constitutional" status.

2. Multi-Textuality as Sequence

We have so far seen three models of multi-textual constitution-making that constitutional designers may use at the founding moment to structure their constitution as a collection of several documents. There is yet another way to design a multi-textual constitution at the founding moment: constitutional designers can enact a multi-textual constitution as part of a sequence intended ultimately to culminate in the consolidation of all documents into a uni-textual constitution. In these cases, multi-textuality is a process that intentionally disaggregates higher laws at the beginning but only as a temporary constitutional form that will later become uni-textual.

The Constitution of Israel illustrates this mode of multi-textual constitutional creation. The country's Declaration of Independence on May 14, 1948, contemplated that an elected Constituent Assembly would work toward enacting a uni-textual constitution "not later than the 1st October 1948."[55] But this plan fell through. In the end, the Constituent

> Therefore, these fundamental constitutional acts of the State of Lithuania, as the primary sources of Lithuanian constitutional law, may never be altered or repealed.

Id. § 6.4. The judicial identification of documents that are henceforth to be treated as constitution-level documents reflects a model of multi-textual constitution-making by judicial interpretation, which I discuss in Subsection I.C.3.

[53] Lietuvos Respublikos Kostitucija [Constitution] art. 150 (Lith.).

[54] Id., as amended by No. IX-2343, Official Gazette no. 111-4123 (2004) (Lith.).

[55] Declaration of the Establishment of the State of Israel, ¶ 11 (1948), https://catalog.archives.gov.il/en/chapter/the-declaration-of-independence [https://perma.cc/8LZ3-8TQ8].

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Assembly (renamed the First Knesset) did not convene to start its work until the following year in 1949.[56] When the members of the First Knesset finally managed to get started on the country's uni-textual constitution, they were unable to reach agreement on the content and form of the new constitution. The First Knesset ultimately agreed on a compromise position that would allow the new country to make progress in building the state. That compromise is memorialized in what is known as the Harari Resolution:

> The First Knesset assigns to the Constitution, Law, and Justice Committee the task of preparing a constitution proposal for the country. The constitution will be made up of chapters so that each one is a separate basic law onto itself. The chapters will be submitted to the Knesset as the Committee completes its work, and all the chapters together will be collected into the constitution of the country.[57]

This groundbreaking compromise to enact different parts of the constitution at different stages was the first step in the planned sequence for Israel to create a multi-textual constitution. The Israeli Constitution would be born initially as a series of separate documents known as "Basic Laws," each one dealing in piecemeal fashion with a different dimension of constitutional law in Israel and each one understood to have a special status in law.[58] The special status of these higher laws derived from a transitional law passed by the First Knesset before its term expired. In this law, the First Knesset conferred its constitution-making powers on the Second Knesset and authorized its subsequent transfer to future Knessets.[59] As a result, when the Knesset began to enact Basic Laws, it was well understood that these laws had special constitutional status.[60] The grand plan was to enact these self-standing documents of higher law stepwise on their own, and then, when the time was right, finally to consolidate them into a single uni-textual constitution for Israel.[61]

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[56] Claude Klein, A New Era in Israel's Constitutional Law, 6 Isr. L. Rev. 376, 377–79 (1971).

[57] Gideon Sapir, The Israeli Constitution: From Evolution to Revolution 15 (2018) (citing DK, 1st Knesset, Session No. 152 (1950) 1743 (Isr.)).

[58] Ruth Gavison, Constitutions and Political Reconstruction? Israel's Quest for a Constitution, 18 Int'l Socio. 53, 57–58 (2003).

[59] See Suzie Navot, Constitutional Law of Israel 35–36 (2007).

[60] Id. at 36–37.

[61] Barak Cohen, Empowering Constitutionalism with Text from an Israeli Perspective, 18 Am. U. Int'l L. Rev. 585, 633 (2003).

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Today, over seventy years later, the Constitution of Israel has yet to be codified into a single text of higher law. It consists instead of over one dozen Basic Laws, including "The Knesset," which came into force in 1958; "Israel Lands," passed in 1960; "The President of the State" in 1964; "The State Economy" in 1975; "Human Dignity and Liberty" in 1992; and most recently "Israel—The Nation State of the Jewish People" in 2018.[62] These and other Basic Laws are self-standing documents of higher law that form disaggregated parts of the written components of the Constitution of Israel. They are designed to give the impression that the "Israeli Constitution is a work in progress" since "[e]ach of these Basic Laws was passed individually, and essentially became a chapter in the as-yet unfinished Israeli Constitution."[63] These Basic Laws vary in their degree of procedural and substantive entrenchment.[64]

Many have called for Israel to take the next step in its constitutional evolution to codify a formal constitution, as outlined in the Harari Resolution. Part of the motivation is to create an official text that includes all rights and protections one might expect to see in a constitution, since Israel's Basic Laws do not cover all constitutional ground.[65] Supporters of a uni-textual constitution for Israel also anticipate that it would set limits on the powers of simple majorities in the country's parliamentary system.[66] Yet others take the competing view that Israel is doing well enough with its multi-textual constitution and does not need a uni-textual higher law. According to this view, Israel's choice to "decide not to decide" has allowed the country to mediate the many tensions and disagreements in the land by pragmatic negotiation, accommodation, and compromise—a much better way, some would argue, for a complex state to manage these tensions than to resolve difficult ideological disputes by forcing consensus into a uni-textual constitution.[67]

[62] For a list of Basic Laws currently in force, see Adam Zeidan, Basic Law: Israeli Government, Encyclopedia Britannica, https://www.britannica.com/topic/basic-law-Israel [https://perma.cc/687S-XHEL] (last updated July 25, 2023).

[63] Isaac Amit, From the Bill of Rights to Basic Laws: Constitutional Rights in Israel, 25 Cardozo J. Int'l & Compar. L. 483, 484 (2017).

[64] See Suzie Navot & Yaniv Roznai, From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel, 21 Eur. J.L. Reform 403, 407–09 (2019).

[65] Meir Shamgar, On the Need for a Constitution, 11 Isr. Affs. 345, 345, 354 (2005).

[66] Samuel Sager, Israel's Dilatory Constitution, 24 Am. J. Compar. L. 88, 91 (1976).

[67] Joshua Segev, Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel, 70 Alb. L. Rev. 409, 489 (2007).

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Looking back, launching the constitution-making process in Israel as a multi-textual project may have been the best way to proceed for a country that "is replete with paradoxes," as was observed in 1956.[68] To put the point more generally beyond the Israeli case: "[T]he absence of a constitution allows for a variety of low-visibility arrangements, that may mitigate social and political tensions, which would have been hard to ignore if they had been entrenched in the state's constitution."[69] Today in Israel, these opposing views continue to exert pressure both for and against pursuing the Harari Resolution to its conclusion.[70]

3. Transforming Multi-Textuality by Consolidation

We have learned from the Israeli context that multi-textual constitutions can be designed at the moment of constitutional creation, eventually to be transformed into uni-textual constitutions. A similar process can occur without deliberate thought at the founding; transforming a multi-textual constitution into a uni-textual one can occur after the founding as part of a constitutional consolidation. Imagine, for instance, a jurisdiction whose multi-textual constitution consists of a handful of documents recognized as comprising the constitution, each with equal constitutional status and significance. Imagine further that, over time, as these higher laws are altered by constitutional amendment, this collection of documents grows longer and more complex, and it exposes internal inconsistencies across separate documents. In cases like these, constitutional designers might believe it is best for purposes of both constitutional clarity and constitutional form to consolidate these separate higher laws into one uni-textual constitution.

A useful illustration of this kind of transition from multi-textuality to uni-textuality comes from Albania. Prior to 1998, the Albanian Constitution consisted of several documents, including the first one

[68] Benjamin Akzin, Codification in a New State: A Case Study of Israel, 5 Am. J. Compar. L. 44, 44 (1956).

[69] Ruth Gavison, Constitutions and Political Reconstruction? Israel's Quest for a Constitution, 18 Int'l Socio. 53, 65 (2003).

[70] A middle ground has also been suggested: to enact a "thin constitution" that would formalize only procedural constitutional rules in a uni-textual constitution. See Yedidia Stern, Can Israel's Political Strife Be Solved by a 'Thin' Constitution?, Jerusalem Post (June 12, 2023), https://www.jpost.com/opinion/article-745959 [https://perma.cc/2CF5-4K6V]. But this idea is not new and has attracted criticism for some time. See Hanna Lerner, The Political Infeasibility of "Thin" Constitutions: Lessons from 2003–2006 Israeli Constitutional Debates, 22 J. Transnat'l L. & Pol'y 85, 87–88 (2013).

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adopted in 1991 known as the law "On the Main Constitutional Provisions."[71] This constitutional document outlined the form of government, the organs of government, the bodies of public administration, and the procedures of constitutional change and transition.[72] Three other constitutional laws were then adopted, bringing the total to four.[73] When Albania adopted its 1998 uni-textual constitution, the existing body of constitutional laws was abrogated, clearing constitutional space for the new single document of higher law.[74]

Similarly, the Finnish Constitution of 2000 is the product of consolidating several higher laws of equal significance into one constitutional text. In the 1990s, Finland convened the Constitution 2000 Working Group and tasked it with examining whether the country's multi-textual constitution needed revisions.[75] The Working Group ultimately recommended that the various written parts of the Finnish Constitution be brought together into one unified text.[76] The Working Group gave very specific recommendations, namely that the new constitutional text should be substantially reduced from the 235 sections that spanned the many existing texts of higher law to around 130 total sections.[77] A legislative commission known as the "Constitution 2020 Commission" then began implementing those recommendations to create a new uni-textual constitution.[78] The document was ultimately approved and later became official on March 1, 2000.[79]

The consolidated Constitution of Finland now contains 131 sections, roughly the same number suggested by the Constitution 2020 Working Group. Prior to this extraordinary consolidation, the Finnish Constitution was understood to consist of four constitutional acts.[80] Now the new uni-

[71] Evis Alimehmeti, The Evolution of the Constitutional System in Albania, 2 Academicus 164, 165 (2011).

[72] Id.

[73] Id.

[74] Kushtetuta e Republikës së Shqipërisë [Constitution] Oct. 21, 1998, art. 182 (Alb.) (Presidency of Alb. trans.), https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/53345/99625/F190284648/ALB53345.pdf [https://perma.cc/SQE9-3ERP] ("Law No. 7491, dated 29.4. 1991, 'On the Main Constitutional Provisions' as well as the other constitutional laws are abrogated the day this Constitution enters into force.").

[75] Seppo Tiitinen, Constitutional Reform in Finland, 178 Const. & Parliamentary Info. 104, 105 (1999).

[76] Id.

[77] Id.

[78] Id. at 105–06.

[79] Suomen Perustuslaki [Constitution] June 11, 1999, ch. 13, § 130 (Fin.).

[80] See Jaakko Husa, The Constitution of Finland: A Contextual Analysis 23 (2011).

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textual Constitution of Finland insists in its own text that it comprises only one document and that it is no longer multi-textual. It declares that "[t]he constitution of Finland is established in this constitutional act,"[81] and then proceeds to repeal the four constitutional documents of higher law that once constituted the written parts of the Finnish Constitution:

> This Constitution repeals the following constitutional Acts, as amended:
>
> (1) The Constitution Act of Finland, of 17 July 1919;
>
> (2) The Parliament Act, of 13 January 1928;
>
> (3) The Act on the High Court of Impeachment, of 25 November 1922 (273/1922); and
>
> (4) The Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman, of 25 November 1922 (274/1922).[82]

Today the Finnish Constitution is considerably shorter as a single unified text than it was as four separate constitutional acts—it is now around 13,000 words, down from roughly 23,000 words.[83]

The Albanian and Finnish cases are different insofar as the former was an abrogation of separate constitutional laws and the latter was a consolidation of separate constitutional laws. In both cases, though, the objective was to create a uni-textual constitution. These two cases, while distinguishable, nevertheless both illustrate how a multi-textual constitution can ultimately be transformed by constitutional design into the traditional constitutional form of a single higher law.

C. Multi-Textuality by Evolution

We have learned that multi-textual constitutions can be created by grand-plan design, whether at the moment of constitutional creation or thereafter within a process of constitutional reform. In this Section, we will see how multi-textual constitutions come to life by evolution from the dialogic interactions of political actors and by the impulses of

[81] Suomen Perustuslaki [Constitution] June 11, 1999, ch. 1, § 1 (Fin.).

[82] Id. ch. 13, § 131.

[83] I performed this quantification using English translations of the current Finnish Constitution and each of the four now-superseded constitutional acts.

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constitutional politics. Three illustrations are worth studying. First, the process of pluralizing constitutional texts—of creating one or more additional documents of higher law with equal constitutional status—may occur where it is impracticable to incorporate a new constitutional rule into the existing uni-textual constitution. Second, a uni-textual constitution may become multi-textual as a result of a political practice, when political actors treat an ordinary law as equal in legal status to the founding constitution. Third, the pluralization of constitutional texts can occur by judicial interpretation. Each of these evolutionary forces is distinguishable in its origins but similar in its effect. In this Section, I describe each of these three categories of textual pluralization with reference to constitutions in Brazil, Denmark, and France.

1. Multi-Textuality by Formal Amendment

When political actors amend a traditional uni-textual constitution, the resulting constitutional reform is ordinarily inserted directly into the unified constitutional text using one of several techniques of amendment codification.[84] Both before and after the amendment, the uni-textual constitution remains a single, unified, self-contained document of higher law. In contrast, when political actors amend a multi-textual constitution, that constitutional reform may be codified and formalized in its own separate, self-standing document of higher law that exists detached from others. Those many texts are understood as jointly comprising what is regarded in that jurisdiction as "the constitution." We can understand this constitutional activity as a pluralization of constitutional texts.

In 2004, Brazil enacted a constitutional amendment authorizing this mode of textual pluralization in relation to international human rights treaties.[85] By way of background, it is important to know that the Brazilian Constitution, at its creation in 1988, declared that the rights written into the constitutional text are not an exhaustive enumeration of all rights Brazilians enjoy.[86] The original constitutional text recognized

[84] See Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions 229–40 (2019).

[85] Constituição Federal [C.F.] [Constitution] amend. 45, art. 1 (Braz.) (amending art. 5, para. 3). I am grateful to Bruno Cunha for pointing my attention to this development, and to its explanatory sources, in Brazil.

[86] Id. art. 5, para. 2 ("The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party.").

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that additional rights could derive from domestic constitutional principles as well as from international treaties.[87] Yet the constitutional text left open an important question about the status of international human rights treaties: Are they equivalent to federal laws, in which case they may be repealed by a simple legislative majority, or do they hold a constitutional status shielding them from the ordinary legislative lawmaking process?[88] The Supreme Federal Tribunal of Brazil resolved this question in 1995: the Court held that international human rights treaties—which become binding upon ratification by a simple majority vote in each house of Congress[89]—are equivalent to ordinary federal laws and are therefore repealable by a simple legislative majority.[90]

The Brazilian Congress disagreed with the Court. It overruled the Court with a constitutional amendment enacted in 2004.[91] The text of that 2004 constitutional amendment reads as follows: "International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments."[92] This amendment changed the procedure to ratify international human rights treaties and conventions from a simple majority vote in both houses of Congress to two supermajority votes in both houses of Congress. Going forward, this new, more onerous procedure would be required to ratify treaties and conventions dealing with international human rights. If successful, this would result in special treatment: it would confer constitutional status on the treaty or

[87] Id.

[88] See Renato Braz Mehanna Khamis, The Status of the International Treaties of Human Rights in the Brazilian Constitutional System, 16 Annales Universitatis Apulensis Series Jurisprudentia 75, 78 (2013) (describing the scholarly debate on the constitutional hierarchy of international treaties in Brazil); Allan Rocha de Souza & Alexandre de Serpa Pinto Fairbanks, The Marrakesh Treaty Ratification in Brazil: Immediate Effects, 4 Panorama of Brazilian L. 328, 329–32 (2016) (discussing the doctrinal debate on the constitutional status of international treaties in Brazil).

[89] See also Constituição Federal [C.F.] [Constitution] art. 47 (Braz.) (authorizing each House to take action by majority vote, absent a constitutional rule to the contrary); id. art. 49, para. I (granting the Congress exclusive powers "to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property").

[90] S.T.F., Habeas Corpus No. 72.131-1, Relator: Min. Marco Aurélio, 23.11.1995, 2, Diário da Justiça [D.J.], 01.08.2003, 8650 (Braz.).

[91] Constituição Federal [C.F.] [Constitution] amend. 45, art. 1 (Braz.) (amending art. 5, para. 3).

[92] Id.

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convention, making it equivalent to a constitutional amendment, incorporating it into the Brazilian Constitution, and therefore insulating it against repeal by an ordinary legislative majority in Congress.[93]

This constitutional amendment has had three immediate effects on the Constitution of Brazil—one is legal, the other is functional, and the third is formal. As a matter of law, the amendment has conferred constitutional status on international human rights treaties and conventions ratified by the special procedure, namely approval in two separate votes by a three-fifths supermajority in both houses of Congress. As to the functioning of the constitution, any international human rights treaty or convention ratified by this special procedure will be repealable only by the same supermajorities required to amend the Brazilian Constitution—much higher than what is required in the ordinary lawmaking process.[94] And as a matter of form, once international human rights treaties or conventions are ratified using the special procedure with heightened supermajorities, they become part of the Brazilian Constitution as equivalent to constitutional amendments. However, these treaties or conventions—once ratified by this special procedure—are not incorporated within the four corners of the 1988 constitutional documents, as is the case for amendments. These treaties or conventions will instead exist separately, on their own, as self-standing documents with constitution-level status equal to the Constitution of Brazil.[95]

[93] See Virgílio Afonso da Silva, The Constitution of Brazil: A Contextual Analysis 164–65 (2019).

[94] The Brazilian Constitution requires that a proposed amendment "shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members." Constituição Federal [C.F.] [Constitution] tit. IV, ch. I, § VIII, subsec. II, art. 60, para. 2 (Braz.).

[95] The Supreme Federal Tribunal ruled again, in 2008, on the status of international treaties. This time, the Court made clear that there are two procedures to ratify international treaties in Brazil: first, the original procedure requiring only a simple majority in each house of Congress; and second, the new procedure enacted by the constitutional amendment requiring two separate supermajority votes in each house of Congress. The Court moreover specified that for treaties not involving human rights, the only available procedure for ratification is the original one requiring only a supermajority vote in each house of Congress. These treaties are equivalent to federal law and can accordingly be repealed by federal law. But for treaties involving human rights adopted using the original procedure before or after the enactment of the 2004 amendment, they have a status above ordinary federal law and therefore cannot be repealed by a simple legislative majority. And for treaties involving human rights adopted after the 2004 amendment using the new procedure, they have constitutional status equivalent to a constitutional amendment. They may be repealed only by constitutional amendment. S.T.F.J., Recurso Extraordinário No. 466.343-1, Relator: Min. Cezar Peluso, 03.12.2008, 104,

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As Bruno Cunha explains, "[T]he international human rights treaties and conventions approved by the Brazilian National Congress under Article 5, § 3 of the 1988 Constitution lead to 'separately codified constitutional laws that change the meaning of the constitution but leave the master text unchanged.'"[96] Since the enactment of this amendment authorizing the Constitution's transition to multi-textuality, Brazilian political actors have ratified three international human rights treaties or conventions using the special amendment procedure that confers constitutional status on them: the Convention on the Rights of Persons with Disabilities and its Optional Protocol, adopted in 2009; the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted in 2018; and the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance, adopted in 2022.[97] It would therefore be inaccurate to describe the 1988 Constitution of Brazil as uni-textual, because there are now at least four constitutional documents in Brazil. Today, as a result of the 2004 amendment giving constitutional status to ratified treaties and conventions on human rights, Brazil's Constitution is better described as multi-textual.

2. Multi-Textuality by Political Practice

In addition to a constitution's evolution by amendment from uni-textuality to multi-textuality, textual pluralization can occur by practice in the course of the law-making process. Imagine, for example, that a legislature enacts an ordinary law with a simple majority. In the normal course of affairs, that law would be changeable, even repealable, by a simple legislative majority. We would regard that law as legally subordinate to the constitution. But how would we regard that law if the legislature uses the more difficult constitutional amendment procedure—not the ordinary legislative procedure—to alter it? We might then conclude that the law possesses a special "constitutional" status that it had

Diário da Justiça Eletrônico [D.J.e], 05.06.2009, 1106 (Braz.). I am grateful to Bruno Cunha for his helpful exchanges on these points. See also Antonio Moreira Maués, Supra-Legality of International Human Rights Treaties and Constitutional Interpretation, 10 Int'l J. on Hum. Rts. 205, 207–08 (2013) (describing the 2008 ruling of the Supreme Federal Tribunal).

[96] Bruno Cunha, The Codification of Constitutional Amendments in Brazil: Beyond the Appendative and Integrative Models, *in* The Architecture of Constitutional Amendments: History, Law, Politics 75, 87 (Richard Albert ed., 2023) (quoting Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions 235 (2019)).

[97] Id. at 87–88.

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acquired sometime between its enactment as an ordinary law and its amendment as a higher law. A recent amendment in Denmark is a close parallel to this practice of textual pluralization by political practice.[98]

In 2009, Denmark amended its constitution to proclaim a commitment to gender equality in matters of royal succession, at last opening a door to legal inheritance for both women and men that had long been discriminatorily open only to men.[99] As a result of this constitutional amendment, today, the firstborn child of the monarch—without regard to the gender of the child—becomes heir, and ultimately king or queen. Yet curiously, it was not the 1953 Danish Constitution Act that was amended to reflect this change. It was instead the Act of Succession, a separate and self-standing law that had been enacted several weeks earlier in 1953. How, then, did a reform of the prior Act of Succession—not of the founding Constitution—amount to an amendment of the Danish Constitution? The answer reveals how multi-textuality can occur by political practice.

Prior to its 2009 amendment, the Act of Succession expressed a "precedence correspondingly for men over women."[100] It stated that "[o]n the death of a King the throne shall pass to his son or daughter, a son taking precedence over a daughter, and where there are several children of the same sex the elder child shall take precedence over the younger child."[101] The text moreover stated that "[o]n the death of a King who leaves no issue entitled to succeed to the throne, the throne shall pass to his brother or sister, with precedence for the brother."[102]

The impetus to reform the Act of Succession was to achieve gender equality in succession. But the Act did not specify how it was to be amended. Given the choice of using an ordinary or constitutional procedure to reform the Act of Succession, the country ultimately chose to use the onerous rules of amendment codified in the Danish Constitution Act to amend this separate, self-standing Act of Succession.[103] The

[98] I am grateful to Simon Drugda for suggesting this Danish example as an illustration of textual pluralization.

[99] See Elin Hofverberg, On this Day: The Danish Queen Margarethe II—50 Years as Head of State, In Custodia Legis (Jan. 14, 2022), https://blogs.loc.gov/law/2022/01/on-this-day-the-danish-queen-margarethe-ii-50-years-as-head-of-state [https://perma.cc/9HP6-B6XL].

[100] Tronfølgelov [Act of Succession] § 4 (1953) (Den.).

[101] Id. § 2.

[102] Id. § 3.

[103] Amending the Danish Constitution Act is no easy feat. In order to be successful, an amendment proposal must be approved in the national legislature, after which the legislature

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explanation given at the time for treating the Act of Succession as a constitutional law rather than an ordinary law was that the Act of Succession is mentioned expressly in the Danish Constitution Act.[104] This was a curious justification because reference to a law in a constitutional document does not oblige political actors to treat that law as "constitutional." This justification nonetheless proved satisfactory at the time to those involved in amending the Act of Succession.

To understand the origins of the reference to the Act of Succession in the Constitution Act, we must return to 1953. The Act of Succession was mentioned explicitly at the time in the drafting of the Constitution Act because, as a condition for its lawful and legitimate promulgation, the Constitution Act had to be approved by the people in a referendum.[105] In order to assure the ratification of the Constitution Act in this referendum, the strategic calculation was made to mention the Act of Succession because of the strong popularity of the royal family at the time.[106] Referring to the rules of succession would attract voters in sufficiently large numbers to satisfy the high-quorum requirement needed for the referendum to count.[107] And because the Act of Succession would now permit women to inherit the throne—but only if they had no older or younger brothers—it would attract voters who supported this incremental step toward gender equality.

The political origins of the reference to the Act of Succession in the 1953 Constitution Act do not, on their own, compel treating the Act of Succession as a "constitutional" document. The choice to treat the Act of Succession as equivalent to the Constitution Act was just that—a choice made by Danish political actors at the time of the amendment in 2009 as

must be dissolved and reconstituted in a new election. The newly constituted legislature must then approve the same text of the amendment proposal a second time. Next, the amendment proposal must be approved by a majority of voters in a national referendum in which at least forty percent of eligible voters cast a ballot. The final step is promulgation by the monarch. Danmarks Riges Grundlov [Constitution] June 5, 1953, pt. X, § 88 (Den.).

[104] See Forslag til Lov om ændring af tronfølgeloven: Bemærkninger til lovforslaget [Proposals to Act Amending the Succession to the Throne Act: Comments on the Bill] Oct. 7, 2008, para. 3.1 (Den.), https://www.retsinformation.dk/eli/ft/200812L00001 [https://perma.cc/2P8R-ZZAK]; Danmarks Riges Grundlov [Constitution] June 5, 1953, pt. I, § 2 (Den.) ("Royal authority shall be inherited by men and women in accordance with the provisions of the Act of Succession to the Throne of March 27th 1953.").

[105] Helle Krunke, Monarchy and Gender in Denmark, 7 Royal Stud. J. 49, 51 (2020).

[106] Id.

[107] Id.

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to how to interpret and implement the constitution.[108] It was a reasonable choice to treat the Act of Succession as "constitutional," given its political importance and its history predating even the Constitution Act.

The result of the 2009 amendment was to make the Act of Succession completely gender neutral.[109] Gone now is the phrase "precedence correspondingly for men over women," and today it states that "[u]pon the death of a King or a reigning Queen, the throne shall pass to his/her son or daughter, the elder child taking precedence over the younger child."[110] The text also states that "[i]f a King or a reigning Queen dies without issue who is entitled to inherit the throne, the brother or sister of the King or reigning Queen shall succeed to the throne."[111] These are momentous changes to the Danish law of succession. This reform shows how a text once treated as an ordinary law can acquire constitutional status by political practice.

3. Multi-Textuality by Judicial Interpretation

I have so far traced two paths to multi-textuality by evolution. It can occur, first, as a result of a constitutional amendment and, second, as a result of political practice in the lawmaking process. There are other paths to multi-textuality by evolution. One in particular is through courts. In the course of interpreting a constitution, judges may confer constitutional status upon documents that have not previously been regarded as "constitutional." When a judge designates a given document as "constitutional," that document attains a status equal to what is recognized in the jurisdiction as "the constitution." The French constitutional experience illustrates this form of constitutional evolution: the creation of a multi-textual constitution by judicial interpretation.[112]

When the French Constitution was enacted in 1958, its preamble declared that "[t]he French people solemnly proclaim their attachment" to parts of two documents beyond the Constitution itself: (1) the rights and principles of national sovereignty defined in the French Declaration

[108] Helle Krunke, Formal and Informal Methods of Constitutional Change in Denmark, *in* Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA, supra note 42, at 73, 77.

[109] Danish Succession, Deutsche Welle (June 8, 2009), https://www.dw.com/en/denmark-votes-to-change-royal-succession-rules/a-4310654 [https://perma.cc/K6ZA-JVA3].

[110] Lov om ændring af tronfølgeloven [Act of Succession] June 12, 2009, § 2, para. 1 (Den.).

[111] Id. § 3.

[112] I thank Mathilde Ambrosi for so helpfully explaining the historical and legal antecedents to the evolution of the French Constitution into a multi-textual form.

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of the Rights of Man and of the Citizen, enacted in 1789; and (2) the preamble of the 1946 Constitution.[113] A simple reference alone to external documents, without more, does not make a constitution multi-textual. In this case, the 1958 preamble did not expressly incorporate by reference these two texts, nor did it make their contents directly or indirectly binding in the country. This preambular reference therefore raised a question that a plain reading of the 1958 Constitution could not answer: What is the legal status in the current French constitutional order of the 1789 French Declaration of the Rights of Man and of the Citizen and the 1946 Constitution?

The French Constitutional Council answered this question in a momentous ruling in 1971: these two documents—each enacted long before the 1958 French Constitution—have constitutional force and effect in the present constitutional order, and may consequently serve as the basis for evaluating the legality of official conduct.[114] It is difficult to overstate the importance of this judgment, described as a "juridical revolution"[115] and as the Council's "most important decision to date."[116] To understand why, we must consider how the Council arrived at its conclusion that the French Constitution consists of more than the single document called "the Constitution."

The dispute involved a 1971 statutory amendment to a law enacted in 1901.[117] The 1901 law recognized the freedom of association and granted protected legal status to groups upon registration with the state.[118] The 1971 amendment sought to alter this automatic legal recognition: groups would now achieve protected legal status only upon approval by the state.[119] As Sophie Boyron explains, this meant that "[f]reedom of association would in effect be lost."[120] Freedom of association had a precarious constitutional status at the time because the 1958 Constitution did not contain a bill of rights that protected freedom of association. In

[113] 1958 Const. pmbl. (Fr.).

[114] Conseil constitutionnel [CC] [Constitutional Council] decision No. 71-44DC, July 16, 1971, J.O. 7089, 7114 (Fr.).

[115] Cynthia Vroom, Constitutional Protection of Individual Liberties in France: The *Conseil Constitutionnel* Since 1971, 63 Tul. L. Rev. 265, 274 (1988).

[116] Martin A. Rogoff, Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond, 6 Jus Politicum 1, 17 (2011) (Fr.).

[117] Sophie Boyron, The Constitution of France: A Contextual Analysis 38 (2013).

[118] Id.

[119] Id.

[120] Id.

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the absence of a textual referent that could be read to protect association, the 1971 statutory amendment would have to stand.

The French Constitutional Council had to get creative to protect the freedom of association. Noting that the preamble to the Constitution refers to the Declaration of the Rights of Man and of the Citizen of 1789 and also to the preamble to the 1946 Constitution,[121] the Council incorporated both documents in relevant part into the 1958 Constitution.[122] But even this move was insufficient to protect the freedom of association because neither document refers expressly to it. The Council took the further step of reading into the 1958 Constitution a body of unwritten "fundamental principles recognised under the laws of the Republic and solemnly reaffirmed in the preamble to the Constitution."[123] It is within this unwritten corpus of principles that the Council located the freedom of association.[124] The Council accordingly held that the freedom of association is a protected right in France.[125] This in turn gave the Council a legal basis to declare invalid the relevant parts of the 1971 amendment to the long-standing 1901 law on freedom of association.[126]

The result of the Council's ruling in 1971 was to transform the uni-textual 1958 French Constitution into a multi-textual constitution recognized under law to consist of several documents: (1) the 1958 Constitution itself, including its preamble; (2) the Declaration of the Rights of Man and of the Citizen of 1789; (3) the preamble to the 1946 Constitution; and (4) the laws of the French Republic that are understood to contain fundamental principles. This pluralization of constitutional documents was an extraordinary legal development in France. According to one scholar, the pluralization was extraordinary because the Council conferred a special constitutional status on texts that had, until then, not

[121] Conseil constitutionnel [CC] [Constitutional Council] decision No. 71-44DC, July 16, 1971, J.O. 7089, 7114 (Fr.); see also Liav Orgad, The Preamble in Constitutional Interpretation, 8 Int'l J. Const. L. 714, 726–27 (2010) (explaining how the Council read the Declaration of the Rights of Man and of the Citizen of 1789 and the preamble to the 1946 Constitution into the 1958 Constitution).

[122] Boyron, supra note 117, at 38.

[123] CC decision No. 71-44DC, July 16, 1971, J.O. 7089, 7114 (referring to "principes fondamentaux reconnus par les lois de la République et solennellement réaffirmés par le préambule de la Constitution").

[124] Boyron, supra note 117, at 38–39.

[125] Id. at 39.

[126] Id.

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exerted any force under the constitution.[127] Since that revolutionary judicial ruling, an additional document has been added to the list of authoritative constitutional texts in France: the Charter for the Environment, specifically the rights and duties codified within it. This recent addition to the body of texts that comprise the French Constitution is the product of a constitutional amendment enacted in 2005.[128]

The Constitutional Council's 1971 ruling gave rise to a term that has been used to make sense of the multi-textual form of the French Constitution: the "bloc de constitutionnalité."[129] The usefulness of the term becomes apparent in its English translation, "constitutionality block," a reference to the legal reality that what is considered the "Constitution" of France exceeds the four corners of the document enacted in 1958. As Élizabeth Zoller and Wanda Mastor have written, "in the French system, constitutionality is wider than the Constitution in the strict sense."[130] The term "bloc de constitutionnalité" was first used in 1970 but it was not until 1975—after the Council's historic ruling in 1971—that the term began to grow in use and application to refer to the multi-textual nature of the French Constitution.[131]

* * *

We have so far discovered the origins of multi-textual constitutions: they may be created by intentional design at the founding moment or by unforeseen evolution after the enactment of the constitution through constitutional amendment, political practice, and judicial interpretation. This unique constitutional form raises promising possibilities for constitutional governance and democratic outcomes. Yet before we explore those opportunities, we turn next to some challenges raised by multi-textuality in relation to the basic operation of a constitution.

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[127] David Mongoin, Brèves de Lecture Théorique de la Décision de 1971 [Newsletter of Theoretical Reading on the 1971 Decision], 130 Revue Française de Droit Constitutionnel [French. Rev. Const. L.] 315, 325 (2022) (Fr.).

[128] Loi 2005-205 du 1 mars 2005 relative à la Charte de l'environnement [Constitutional Law 2005-205 of March 1, 2005 Relating to the Environmental Charter], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 2, 2005, art. 1 (Fr.).

[129] See Jean-Sébastien Boda, Bloc de Constitutionnalité ou Désordre Constitutionnel? [Constitutionality Block or Constitutional Disorder?], 130 Revue Française de Droit Constitutionnel [French Rev. Const. L.] 393, 396–405 (2022) (Fr.) (tracing the intellectual origins and evolution of the term).

[130] Élisabeth Zoller & Wanda Mastor, Droit Constitutionnel 241 (3d ed. 2021) ("Dans le système français, la constitutionnalité est plus large que la Constitution au sens strict.").

[131] See Charlotte Denizeau-Lahaye, La genèse du bloc de constitutionnalité [The Origin of the Constitutionality Block], 8 Titre VII (2022) (Fr.).

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II. THE CHALLENGES OF MULTI-TEXTUALITY

No matter their origins, multi-textual constitutions confront serious challenges as a result of their form as disaggregated documents of equal constitutional status. Those challenges are largely foreign to uni-textual jurisdictions because the very nature of a unified constitutional text forecloses them. In this Part, I draw from the Canadian Constitution to highlight some of the dynamics of multi-textuality.

One of the world's oldest constitutions,[132] the Canadian Constitution was designed from the very beginning to be multi-textual. Yet the origins of the country's multi-textual constitutional form derive from its British colonial influences and inherited traditions, rather than a carefully considered judgment that multi-textuality would necessarily prove better than a uni-textual constitution. Shining a light on the multi-textual Canadian Constitution reveals how and why questions taken for granted in uni-textual jurisdictions—either because the questions are inapplicable or because the answers are uncontested—become contestable in multi-textual jurisdictions. I focus here on three problems that are uncommon in uni-textual jurisdictions: first, the problem of identifying which texts are constitutional and which are not; second, the problem of determining how and when a set of legal rules becomes entrenched; and third, the problem of resolving conflicts between two separate self-standing constitutional texts of equal legal authority.

A. Constitutional Identification

In uni-textual jurisdictions, there is no need to ask the following question: Where is the constitution? Political actors and the people in these jurisdictions know precisely where to find their constitution. It is the supreme and authoritative document of higher law that governs the land. Often but not always adopted with a special procedure requiring heightened majorities or extended deliberations, this single document holds unique status in law and society—and it is perceived differently from other enactments. In these jurisdictions, it is straightforward to identify what is constitutional and what is not. The reason why is worth

[132] See Martin Armstrong, The World's Oldest Constitutions, Statista (Sept. 17, 2021), https://www.statista.com/chart/16355/constitutions-world-oldest [https://perma.cc/AG5S-NSH9].

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emphasizing: codifying a uni-textual constitution extinguishes doubt on where to find the thing called "the constitution."[133]

1. The Inclusion Clause

In contrast, "Where is the constitution?" is an open question in Canada. The Canadian Constitution declares its multi-textuality in the Constitution Act, 1982, one of its many constitutional documents. But the Constitution does not expressly limit the boundaries of its multi-textuality. On the contrary, the Constitution suggests a certain provisionality in its own self-definition. The key word to highlight from the language excerpted below from Section 52(2) of the Constitution Act, 1982 is "includes" in the phrase "The Constitution of Canada *includes* . . . ."

> Constitution of Canada
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[134]

This passage—let us call it the Inclusion Clause—sets out to define what counts as constitutional in Canada. Yet far from specifying reliably what or where is the Constitution, the Inclusion Clause breeds doubt about what should be defined as falling inside or outside the Constitution of Canada. We will soon see how and why the Inclusion Clause is a source of interpretive difficulty.

2. A Constitution in Four Parts

We know from the plain text of the Inclusion Clause that the Constitution of Canada has at least four parts. Certain parts are readily

[133] Yet even in the best-known uni-textual jurisdiction, there are questions about the existence and status of "unwritten" constitutional rules. See Akhil Reed Amar, America's Constitution, Written and Unwritten, 57 Syracuse L. Rev. 267, 268–70 (2007); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 717 (1975). See generally Christopher G. Tiedeman, The Unwritten Constitution of the United States (1890) (demonstrating that the U.S. Constitution is always changing without corresponding amendments to its text).

[134] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 52(2) (U.K.).

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identifiable: they are known, tangible, findable items. But others defy easy identification and invite deep contestation on what counts as constitutional.

First, the Constitution consists of the Canada Act 1982,[135] which incorporates the Constitution Act, 1982 within it. The Canada Act, 1982 was enacted into law by the Parliament of the United Kingdom at the request of the Canadian House of Commons and the Senate.[136] This U.K. statute terminates the power of the U.K. to legislate for Canada. It states in relevant part that "[n]o Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law."[137] The Constitution Act, 1982 itself contains, among other items, a Canadian homegrown bill of rights and a comprehensive amendment procedure.[138]

Second, the Constitution Act, 1982 explains that the Constitution consists of "the Acts and orders referred to in the schedule."[139] This schedule is appended to the Constitution Act, 1982. The schedule contains thirty separate entries, each a statute or order that is renamed or repealed as a result of the termination of the U.K.'s legal authority over Canada. For instance, the schedule indicates that the British North America Act, 1867 is renamed the Constitution Act, 1867; the Order of Her Majesty in Council admitting Prince Edward Island into the Union is renamed the Prince Edward Island Terms of Union; and the British North America Act, 1949 is renamed the Newfoundland Act.[140] In addition, the schedule announces that several laws are concurrently repealed in whole or in part, including the Canadian Speaker (Appointment of Deputy) Act, 1895, Sections 4 and 7(1) of the Statute of Westminster in relation to Canada, and the British North America Act, 1943.[141]

Third, the Constitution Act, 1982 specifies that the Canadian Constitution consists of "any amendment to any Act or order" listed on the schedule of statutes and orders that form part of the Constitution, as

[135] Canada Act, 1982, c 11 (U.K.), *reprinted in* R.S.C. 1985, app II, no 44 (Can.).

[136] Id. ("An Act to give effect to a request by the Senate and House of Commons of Canada."); see also Stephen A. Scott, The Canadian Constitutional Amendment Process, 45 L. & Contemp. Probs. 249, 251–53 (1982) (describing the sequence of events leading to the enactment of the Canada Act, 1982).

[137] Canada Act, 1982, c 11 § 2 (U.K.).

[138] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[139] Id. § 52(2)(b).

[140] Id. at sched. to the Constitution Act, 1982, items 1, 6, 21.

[141] Id. at sched. to the Constitution Act, 1982, items 11, 17, 19.

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well as any amendment to the Canada Act, 1982 or the Constitution Act, 1982.[142] This raises a definitional question of its own: What counts as an "amendment" to the Constitution? The Constitution Act, 1982 anticipates this question with what seems to be a clear answer: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."[143] We will soon see that this answer is far from clear.

Finally, fourth, the use of the word "includes" in the phrase "[t]he Constitution of Canada includes" in the Constitution Act, 1982[144] suggests that its enumeration may not be exhaustive. It signals that there may be other items with constitutional status to be counted among the statutes and orders that comprise the written parts of the Constitution. As a result, the list of written documents of higher law in Canada may be even longer than the long list we have already reviewed: the Canada Act, 1982, the Constitution Act, 1982, the statutes and orders referenced in the schedule, and any amendments to the items on the schedule. The problem, though, is that neither the phrase "[t]he Constitution of Canada" nor the word "includes" comes with a glossary to set the boundaries of what falls within or beyond the Constitution. This is the source of the difficulty involved in identifying what counts as "constitutional" in Canada. The key takeaway is not that it is impossible to answer the question; it is rather that this question must be asked at all.

3. The Limits and Horizons of the Inclusion Clause

We can ourselves identify some documents that should be treated as constitutional under the Inclusion Clause. To begin, we can perceive quite clearly that some foundational documents of constitutional significance from the period prior to 1867 are absent from the schedule appended to the Constitution Act, 1982.[145] For instance, each of the Royal Proclamation of 1763, the Quebec Act of 1774, the Constitutional Act of 1791, and the 1840 Act of Union is absent, yet each of them bears substantially on the historical interpretation and identification of the

[142] Id. § 52(2)(c).
[143] Id. § 52(3).
[144] Id. § 52(2).
[145] See John George Bourinot, Canada Under British Rules 1760–1900, *in* The Constitutions That Shaped Us: A Historical Anthology of Pre-1867 Canadian Constitutions 25, 26–27, 30, 35, 40 (Guy Laforest, Eugénie Brouillet, Alain-G. Gagnon & Yves Tanguay eds., 2015).

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Constitution of Canada.[146] There also exist post-1867 documents of constitutional significance that are likewise absent from the schedule, for instance the Letters Patent of 1947, which is the modern basis for the Office of Governor General.[147] Were there no Inclusion Clause in the Constitution, it would be worth asking whether these documents of constitutional importance should be counted within the universe of relevant referents and legal sources to interpret a constitution that has failed expressly to mention them. But the Inclusion Clause makes room for these texts to be counted despite their absence.

The Inclusion Clause must be interpreted also as referring to non-textual sources of constitutional significance, such as the unwritten rules, practices, and principles that sit at the base of the Constitution of Canada. Any other reading of the Inclusion Clause would conflict with the preamble to the Constitution Act, 1867, which stresses at the outset that Canada is to have a "Constitution similar in Principle to that of the United Kingdom."[148] And as is well known, the U.K. Constitution consists of sources beyond written rules, namely parliamentary privileges, constitutional conventions, the Royal Prerogative, and other unwritten sources of law.[149] This central feature of the U.K. Constitution distinguishes it from many of its global counterparts but it is, by intentional design, a shared similarity with the Canadian Constitution.

The challenge of defining what is "constitutional" in Canada does not center on the inexhaustive language of the Inclusion Clause; that much seems clear as a matter of plain textual interpretation. The challenge instead involves how to apply this interpretation to specific cases.

The Supreme Court of Canada has read the Inclusion Clause as inexhaustive. In its effort to illuminate what counts as "constitutional" in Canada, the Court has written that the "Constitution of Canada certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining

[146] See Jeremy Webber, The Constitution of Canada: A Contextual Analysis 10–19 (2d ed. 2021).

[147] See Ronald I. Cheffins, The Royal Prerogative and the Office of Lieutenant Governor, 23 Canadian Parliamentary Rev. 14, 14–15 (2000).

[148] Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

[149] See Peter Leyland, The Constitution of the United Kingdom: A Contextual Analysis 25–84 (3d ed. 2016).

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constitutional rules, they are not exhaustive."[150] The Court has moreover recognized that "[t]he Constitution also embraces unwritten, as well as written rules . . . [and] includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."[151]

But these statements have been pitched at a high level of generality, and they have not saved the Court from having to wrestle with the difficulty of interpreting the Inclusion Clause. In some cases, the Court has concluded that the Inclusion Clause creates space to recognize as "constitutional" even those statutes or orders not enumerated in the schedule appended to the Constitution Act, 1982. In the most prominent case considering whether an unenumerated statute should be read into the list of constitution-level statutes and orders, the Court could not reach unanimity on the issue.[152] This reveals the interpretive challenge posed by the Inclusion Clause's expansionary language. Surely it would be much better for the integrity, predictability, and stability of the Constitution to have agreement on the scope of what is within and beyond bounds.

In still other cases, the Court has read the Inclusion Clause to encompass unwritten elements. For instance, the Court has concluded that parliamentary privileges, although not enumerated, are protected as part of the Constitution of Canada.[153] The Court has also determined that judicial independence is an unwritten constitutional norm that should be accorded robust protection as part of the Constitution.[154] Yet in neither case was the Court unanimous, again illustrating the difficulty of implementing the correct reading of the Inclusion Clause, which is that it is not an exhaustive enumeration of the elements—written or unwritten—of the Canadian Constitution, itself designed to be in its form and operation similar to the U.K. Constitution.

Applying the Inclusion Clause to a concrete set of facts raises an additional challenge: how to understand what the Inclusion Clause means

[150] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 32 (Can.) (internal quotation marks omitted).

[151] Id. (internal quotation marks omitted).

[152] Reference re Supreme Court Act, ss 5 & 6, [2014] 1 S.C.R. 433, paras. 73, 74, 97–98, 115 (Can.). For a fuller discussion, see infra Section III.B.

[153] See New Brunswick Broad. Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, 373–75 (Can.).

[154] See Reference re Remuneration of Judges of the Provincial Ct. of Prince Edward Island, [1997] 3 S.C.R. 3, 63–64 (Can.).

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by an "amendment." The Inclusion Clause takes care to define amendments by specifying that they "shall be made only in accordance with the authority contained in the Constitution of Canada."[155] But this definition nonetheless leaves much doubt as to what precisely counts as an amendment to the Constitution and, in turn, as part of the Constitution of Canada. Here is why: the reference in the Inclusion Clause to amendments made "only in accordance with the authority contained in the Constitution of Canada"[156] opens the door to the Court recognizing amendments made beyond those enacted using the intricate and complex formal amendment rules codified in Part V of the Constitution Act, 1982.[157] And this can yield serious problems for identifying whether an amendment has been made to the Constitution.

It would be easy—not just easier—to identify what counts as an amendment if the Inclusion Clause used a text-based definition of "amendment" that credited only those textual changes made through Part V as amendments. But the language of the Inclusion Clause closes that door to clarity. And, indeed, the Supreme Court of Canada has acknowledged that "amendments to the Constitution are not confined to textual changes" but also "include changes to the Constitution's architecture."[158] The concept of the Constitution's "architecture"[159] is contested and contestable, and today there is still no shared understanding of what it means.[160] How, then, can we know reliably what amounts to a change to the architecture of the Constitution of Canada? The Court's reading of "amendment" has made it hard to identify the constitutive

[155] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 52(3) (U.K.).

[156] Id.

[157] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c 11, pt. V (U.K.) (Procedure for Amending Constitution of Canada).

[158] Reference re Senate Reform, [2014] 1 S.C.R. 704, para. 27 (Can.).

[159] The Court has elaborated this concept in broad strokes, noting that the Court has an "internal architecture," which "expresses the principle that the individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole." Id. at para. 26 (internal citations omitted). The Court added that

> [i]n other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

Id.

[160] See Emmett Macfarlane, Constitutional Pariah: *Reference re Senate Reform* and the Future of Parliament 8 (2021); Richard Albert, The Most Powerful Court in the World? Judicial Review of Constitutional Amendment in Canada, 110 Sup. Ct. L. Rev. 2d 79, 81 (2023).

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elements of the Constitution without the Court itself specifying the documents and norms that must be counted as constitutional.

B. Constitutional Elevation

In the ordinary course of the evolution of a uni-textual constitution, a set of legal rules becomes entrenched according to a procedure that is codified in the document recognized as the constitution. Using that procedure, the constitution may be amended to add, remove, repeal, or replace a given rule in the text. In the case of an existing legal rule that does not have constitutional status, it may be elevated into a constitutional rule using the same codified procedure of constitutional amendment. When that occurs, the legal rule becomes constitutional and henceforth sits alongside existing constitutional rules as the supreme body of higher law in the jurisdiction. In multi-textual jurisdictions, this elevation from ordinary law to constitutional law can occur without recourse to the codified rules of constitutional reform. In Canada specifically, it can occur in the course of litigation, when a court chooses to elevate a rule from legal to constitutional. An important Canadian case illustrates this problem of constitutional elevation. It involves the Supreme Court of Canada conferring constitutional status on its own enabling statute.[161]

1. An Open Seat on the Court

In 2013, the Canadian Prime Minister nominated Marc Nadon to sit on the Supreme Court as one of the three judges appointed from Quebec.[162] This three-judge requirement is codified in the Supreme Court Act, which established the Court in 1875 as a general court of appeal for the country.[163] On the same day Nadon took the oath of office, a lawsuit was filed challenging the validity of his appointment. Here was the problem, according to the petitioners: the Supreme Court Act specifies that the three judges from Quebec must be selected only "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec

[161] Supreme Court Act, R.S.C. 1985, c S-26, § 3 (Can.); Reference re Supreme Court Act, ss 5 & 6, [2014] 1 S.C.R. 433, paras. 94–95 (Can.).

[162] Press Release, Gov't of Canada, PM Announces Appointment of Justice Marc Nadon to the Supreme Court of Canada (Oct. 3, 2013), https://www.canada.ca/en/news/archive/2013/10/pm-announces-appointment-justice-marc-nadon-supreme-court-canada.html [https://perma.cc/58SN-8BGA].

[163] Supreme Court Act, R.S.C. 1985, c S-26, § 6 (Can.).

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or from among the advocates of that Province."[164] Advocates, a reference to active attorneys, are eligible for appointment to the Supreme Court only after "at least ten years standing at the bar of a province."[165]

At the time of his appointment to the Supreme Court, Nadon was a supernumerary judge of the Federal Court of Appeal of Canada and had previously been—but was not at the time of his appointment to the Supreme Court—a member of the Quebec bar for at least ten years.[166] The constitutional infirmity, then, according to the petitioners, was that Nadon was neither a judge of the Court of Appeal nor of the Superior Court of the Province of Quebec and was consequently ineligible for appointment to the Court.[167] Nor was Nadon qualified for appointment to the Court on the other ground for eligibility, namely his being "from among the advocates of that Province" since he was not at the time a current member of the Quebec bar with at least ten years standing.[168]

The Prime Minister mobilized his majorities in both houses of Parliament to remedy this eligibility problem. Parliament amended the Supreme Court Act by adding new words specifying that "[f]or greater certainty . . . a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province,"[169] and moreover that "[f]or greater certainty . . . a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."[170] The legal fix was to remove the condition of *current* standing in the bar and retroactively to bring Nadon into the pool of eligible nominees given his career as an advocate with at least ten years standing "at any time."[171]

The constitutionality of Parliament's amendment to the enabling statute of the Court became the key question in this case.[172] As the Court explained, the heart of the matter was "whether Parliament can enact declaratory legislation that would alter the composition of the Supreme

[164] Id.
[165] Id. § 5.
[166] Id.
[167] Reference re Supreme Court Act, ss 5 & 6, [2014] 1 S.C.R. 433, paras. 3–4 (Can.).
[168] Id. at para. 4 (internal quotation marks omitted).
[169] Supreme Court Act, R.S.C. 1985, c S-26, § 5.1 (Can.).
[170] Id. § 6.1.
[171] Id.
[172] *Reference re Supreme Court Act*, 1 S.C.R., at para. 72.

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Court of Canada."[173] The Court's use of the word "composition" would prove determinative in the end. To understand why, we must return to the origins of the Supreme Court Act, enacted in 1875.

2. Judicial Self-Entrenchment

The Supreme Court of Canada did not exist when the Constitution Act, 1867 came into force. The country's final court of appeal was to remain the Judicial Committee of the Privy Council in England, consistent with the status of the Constitution Act, 1867 as a colonial statute enacted by the Parliament of the United Kingdom.[174] Perhaps anticipating that Canada would one day establish its own final court of appeal, the Constitution Act, 1867 gave Canada the power to create a general court of appeal.[175] Eight years later, in 1875, the Parliament of Canada passed a statute creating a homegrown Supreme Court, with appellate jurisdiction in civil, constitutional, and criminal matters, as well as original jurisdiction in certain matters on which the Court's advice could be requested by various constitutional actors.[176] Yet the Judicial Committee of the Privy Council remained Canada's court of last resort as to criminal matters until 1933, and as to all other matters until 1949, when at last the Supreme Court of Canada became supreme in more than name alone.[177]

Fast forward now to the constitutional challenge to the Nadon appointment in 2013. The Court in that case observed that the transformation of the Supreme Court from an appellate court (from which appeals could be made to the Judicial Committee of the Privy Council in the U.K.) into the country's highest judicial forum made the Court a "constitutionally essential institution."[178] As the Court described this transition in the *Reference re Supreme Court Act*, "The Court assumed a vital role as an institution forming part of the federal system . . . [and] thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian

[173] Id.

[174] See Anne Roland, Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective, 32 Commonwealth L. Bull. 569, 570–72 (2006).

[175] Constitution Act, 1867 30 & 31 Vict., c 3, § 101, *reprinted in* R.S.C. 1985 app II, no 5 (Can.).

[176] The Supreme and Exchequer Court Act, 1875, 38 & 39 Vict., c. 11, paras. 53–54 (UK).

[177] *Reference re Supreme Court Act*, 1 S.C.R. at para. 82.

[178] Id. at para. 83.

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legal system."[179] For the Court, this new judicial power and authority "had a profound effect on the constitutional architecture of Canada."[180]

After the Court became truly supreme in 1949, its status grew again in 1982. The Constitution Act, 1982 entrenched the "composition" of the Court, specifying that any amendment to that part of the Court's architecture would require the consent of Parliament and all provincial legislatures.[181] In the constitutional challenge to the Nadon appointment, the Court interpreted the constitutional entrenchment of its "composition" as preventing Parliament from acting alone to modify eligibility requirements for any Supreme Court nominee,[182] as Parliament had tried to do for Nadon in relation to the ten-year standing requirement. As a result, the Court nullified the attempted fix to the Supreme Court Act—a fix Parliament had enacted to make Nadon retroactively eligible for appointment to the Court. The Court's judgment was controversial, but it was the correct reading of the Constitution Act, 1982.

According to the Court, the Constitution Act, 1982 entrenched more than the "composition" of the Court. It also "confirmed the constitutional protection of the essential features of the Supreme Court,"[183] notably by entrenching the status and characteristics of the Court. According to the Court, amending the Constitution of Canada in relation to the Court's "essential features" now requires both the House of Commons and the Senate to approve the reform, and so must the legislative assemblies of at least two-thirds of all provinces representing at least fifty percent of the population of all provinces.[184] This is a daunting and onerous configuration of majorities.[185]

[179] Id. at para. 85.

[180] Id. at para. 82.

[181] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 41(d) (U.K.) (contained in Part V, titled "Procedure for Amending Constitution of Canada").

[182] *Reference re Supreme Court Act*, 1 S.C.R. at paras. 91–93 (internal quotation marks omitted).

[183] Id. at para. 90.

[184] Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11, §§ 38, 41(d), 42(1)(d) (U.K.) (contained in Part V, titled "Procedure for Amending Constitution of Canada"). The Court stressed that this procedure applies to the "essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*." *Reference re Supreme Court Act*, 1 S.C.R. at para. 94. The Court defined its "essential features" as including, "at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence." Id.

[185] See Richard Albert, The Difficulty of Constitutional Amendment in Canada, 53 Alta. L. Rev. 85, 99–100 (2015) (showing that the Canadian Constitution may be even more difficult

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3. Constitutionalization Without Constitutional Amendment

The effect of the Court's judgment in *Reference re Supreme Court Act* was to constitutionalize portions of the Supreme Court Act. Recall that this law is the enabling statute of the Court, enacted in 1875 as an ordinary statute in the Parliament of Canada. In the normal course of constitutional practice, an ordinary legislative statute may be amended by its enacting legislative body with only a simple legislative majority. Although Nadon's appointment raised eyebrows for how Parliament sought to remedy his eligibility problem, the conventional distinction between ordinary law and constitutional law would have recognized Parliament's power to do precisely what it did: to amend the Supreme Court Act—at the time formally just an ordinary law—to change the eligibility requirements for appointment to the Court. Yet the Supreme Court held that Nadon's appointment and his swearing-in as a judge of the Court were "void *ab initio*."[186] As a result, Parliament could not exercise the power to change its own law in relation to the Court's "essential features"—a term created and loosely defined by the Court but nowhere mentioned in the Supreme Court Act.

Today, after *Reference re Supreme Court Act*, the only way to modify the Court's "essential features" and its "composition" is to use the procedures of constitutional amendment codified in the Constitution Act, 1982. The formal and functional consequence of the Court's judgment is to constitutionalize the relevant parts of the Supreme Court Act and to elevate it from an ordinary statute into a constitutional act with status equal to the Constitution of Canada. Formally, the Supreme Court Act now has constitutional rank. Functionally, its relevant parts are now entrenched against legislative repeal or revision in the same way that the Constitution is impervious to ordinary legislative change in relation to its most important rules and subjects. This occurred when the Court gave constitutional status to the relevant provisions of the Supreme Court Act, effectively adding a new document to what is known as the Constitution of Canada.

to amend than the U.S. Constitution, ranked by empirical studies of amendment difficulty as the world's most rigid).

[186] *Reference re Supreme Court Act*, 1 S.C.R. at para. 6.

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C. Constitutional Conflict

The disaggregated nature of multi-textual constitutions moreover creates the possibility of conflict between two or more constitutional documents. When one latter-adopted constitutional document comes into interpretive conflict with an earlier-adopted constitutional document, the conflict must be resolved to bring clarity to the meaning of the Constitution. In cases like these, the authoritative arbiter of the meaning of the Constitution must resolve the conflict. In Canada, this role belongs to the Supreme Court. In a landmark case, the Court had to resolve a crucial constitutional conflict between two of the most important constitutional documents in Canada.

1. When Two Constitutional Texts Collide

A group of parents in the Canadian province of Ontario filed a claim of religious discrimination.[187] They had chosen to send their children to private religious schools—some to Jewish day schools and others to independent Christian schools—instead of public schools.[188] These schools are funded by tuition fees and private fundraising.[189]

The conflict involved two constitutional promises: the Constitution Act, 1867 guarantees a public subsidy in Ontario exclusively to Catholic denominational schools whereas the Constitution Act, 1982 guarantees the right to equality without regard to religion. Here was the question facing the Court: Which constitutional protection—the promise of special treatment in the Constitution Act, 1867 or the promise of equal treatment in the Constitution Act, 1982—overrules the other?

2. The Founding Bargain and Modern Values

The parents argued that the Constitution's religious freedom guarantee required Ontario to fund independent religious schools and that Ontario was committing religious discrimination by funding Roman Catholic separate schools and secular public schools while simultaneously denying public funding to independent religious schools.[190] The parents relied on the Constitution Act, 1982.[191]

[187] Adler v. Ontario, [1996] 3 S.C.R. 609, paras. 1–2 (Can.).
[188] Id. at para. 2.
[189] Id. at paras. 3–4.
[190] Id. at para. 26.
[191] Id.

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The Constitution Act, 1982 contains the Canadian Charter of Rights and Freedoms.[192] Enacted in 1982, it reflects the modern values of Canada's multicultural, multinational, multilingual, and multi-juridical state. The Charter protects the rights one might expect of a twenty-first century liberal democratic constitution, namely the freedom of religion and the right to equality under law.[193] These modern constitutional values sit uneasily with the Constitution Act, 1867, the text that formalized Confederation in Canada, a term referring to the union of provinces we know today as Canada. The text of the Constitution Act, 1867 enshrines what is undeniably an unequal treatment of religions. The key passage appears in Section 93, which declares both that education is a matter of provincial jurisdiction and that no law "shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."[194] The purpose of the rule was to give special status to denominational schools operating at the enactment of the Constitution Act, 1867 in order to persuade both sides to come together to form a federal union.[195] Without this special status afforded to religious minorities in Ontario and Quebec, Confederation would not have been achieved. But Confederation ultimately succeeded when the two sides agreed on this special arrangement. As the Court wrote, "The effect of this subsection is to entrench constitutionally a special status for such classes of persons, granting them rights which are denied to others."[196]

Which of these two constitutional rules—each one appearing in a separate, self-standing, and jurisprudentially equal constitutional document—would the Court declare is controlling: the founding bargain in the Constitution Act, 1867, or the modern values in the Constitution Act, 1982? Would the modern religious equality protections in the new Constitution Act, 1982 be interpreted as overruling, and therefore ending, the exclusive denominational subsidy in the old Constitution Act, 1867?

[192] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §§ 1–34 (U.K.).

[193] Id. § 2(a) ("Everyone has the following fundamental freedoms: (a) freedom of conscience and religion . . . ."); id. § 15(1) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").

[194] Constitution Act, 1867, 30 & 31 Vict., c 3, § 93(1) (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

[195] *Adler,* 3 S.C.R. at para. 29.

[196] Id. at para. 25.

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Or would the modern religious equality protection require the exclusive denominational subsidy to now be distributed equitably to all denominational schools, not just to Catholic schools?

3. The Cardinal Term of Confederation

The Court ultimately ruled that the founding bargain in the Constitution Act, 1867 must prevail over the modern values in the Constitution Act, 1982. What this meant, to put it simply, was that the Constitution does not require equal funding for all denominational schools in Ontario.

The Court began by acknowledging that "Section 93 is the product of an historical compromise which was a crucial step along the road leading to Confederation."[197] Observing that "Section 93 is unanimously recognized as the expression of a desire for a political compromise" and that "[w]ithout this solemn pact, this cardinal term of Union, there would have been no Confederation,"[198] the Court explained that Section 93 was "a child born of historical exigency" that "does not represent a guarantee of fundamental freedoms."[199] Section 93 should therefore not be read as a codification of a constitutional right or freedom, but rather as the legal expression of an ancient artifact of history—an artifact that was indispensable to creating Confederation.[200]

The Court conceded that granting special status to this group of religious minorities—the ones who held legal rights to denominational schools at the enactment of the Constitution Act, 1867—"may sit uncomfortably with the concept of equality in the *Charter*."[201] And yet, the Court rejected the argument that this special status in the old Section 93 should be invalidated by the equality protections codified in the modern Section 15(1). As the Court wrote, "To decide otherwise by accepting the appellants' claim that s. 2(*a*) requires public funding of their religious schools would be to hold one section of the Constitution violative of another,"[202] an outcome that was neither anticipated nor intended. The Court decided in the end not "to use one part of the

[197] Id. at para. 29.

[198] Id. (internal quotation marks omitted).

[199] Id. at para. 30.

[200] See Richard Albert, American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective, 88 Marq. L. Rev. 867, 872–81 (2005) (recounting the history of accommodation in Canada that led to the formalization of Section 93).

[201] *Adler*, 3 S.C.R. at para. 33 (internal quotation marks omitted).

[202] Id. at para. 35.

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Constitution to interfere with rights protected by a different part of that same document."[203]

The challenge was to find a way to harmonize these two constitutional documents. Each is understood to hold equal force and authority as constitutive elements of the Constitution of Canada. It would have been reasonable to expect the ordinary rule of construction to apply: where two constitutionally sound statutes collide, the latter-adopted one will govern. In this case, the ordinary rule would have required the guarantee of religious equality in the modern Constitution Act, 1982 to overrule the special protection given to Catholic schools in the older Constitution Act, 1867. Yet the Court held that the subsidy for Catholic schools could not be overruled by implication of the modern constitutional promise of religious equality.[204] This justification is not satisfactory to all, but it is consistent with the reality, as explained by the Court, that Confederation would not have been possible without this essential compromise on religious instruction.[205] The constitutional requirement of public funding for the Ontario secular school system and also for the Catholic separate schools in the province—but not for other schools—could not be invalidated by the religious equality rule in the Constitution Act, 1982 despite the enactment of that rule more than one hundred years *after* the enactment of the special subsidy for religious schools. This problem—pitting one constitutional document versus another—is associated with multi-textual jurisdictions whose multiple constitutional texts are enacted separately but have equal legal force.

III. THE POSSIBILITIES OF MULTI-TEXTUALITY

As we have discovered with reference to the three problems of constitutional identification, constitutional interpretation, and constitutional conflict, multi-textuality entails serious challenges. But multi-textuality also opens new possibilities for constitutional design, constitutional change, and constitutional endurance. In this Part, I explore three areas in which multi-textuality shows potential promise as a constitutional form. First, multi-textuality makes possible the incremental evolution of a constitutional state as it transitions from one regime to a distinctly different one. Second, multi-textuality makes available multiple

[203] Id. at para. 38.
[204] Id. at para. 47.
[205] Id. at para. 29.

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options for constitutional reform and may therefore bring more flexibility to the constitutional order. Third, multi-textuality as a constitutional form may help constitutions avoid the fate that has befallen the U.S. Constitution: the problem of constitutional veneration, which Thomas Jefferson warned could ultimately spell doom for the integrity of the constitution and the survival of the Republic.

A. Constitutional Transition

Constitution-making almost always entails a nontrivial risk of failure.[206] In complex multinational and multicultural federal states with many interests to balance, constitution-making requires political actors to perform nothing short of constitutional heroics to cross the finish line with a new constitutional document.[207] Even in homogeneous states, constitution-making can fail, sometimes even in the face of what may have been high confidence of success.[208] Recognizing the risk inherent in constitution-making, some countries have resorted to multi-textuality as a risk-mitigating device within a larger political framework of a constitutional transition from one regime type to another. In this context, multi-textuality can be an effective tool to smooth the political terrain in a transition that proceeds incrementally rather than immediately.

1. Incremental Constitution-Making

For instance, Poland has resorted strategically to multi-textuality in at least three distinguishable periods of constitutional transition. The most well-known instance occurred in the 1990s in the transition to democracy after the collapse of the Soviet Union. Perhaps less well known are Poland's uses of multi-textuality in two earlier moments: first, in its

[206] For instance, a recent constitution-making exercise in Chile failed in dramatic fashion. See generally Guillermo Larrain, Gabriel Negretto & Stefan Voigt, How Not to Write a Constitution: Lessons from Chile, 194 Pub. Choice 233 (2023) (drawing lessons from the failure of the constitution-making process in Chile).

[207] A paradigmatic case of constitution-making failure in a multinational and multicultural federal state is Canada. For an exposition of Canada's constitution-making failures, see Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? 190–227 (3d ed. 2004).

[208] The Icelandic effort at crowdsourcing a modern constitution-making shows how hard constitution-making can be, even in a homogeneous state. See Salvör Nordal, The Work of the 2011 Constitutional Council: A Democratic Experiment in Constitution-Making, *in* Icelandic Constitutional Reform: People, Processes, Politics 103–27 (Ágúst Þór Árnason & Catherine Dupré eds., 2021).

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transition to independence; and then, in its transition to communism after the Second World War. What emerges is something of a Polish tradition of multi-textuality in transition.

Begin with the modern transition to democracy. There was some hope that a new Polish constitution would be adopted in the immediate aftermath of the dissolution of the Soviet Union in 1989, and indeed a Constitutional Committee was convened for that purpose.[209] The country announced that a new constitution could be promulgated in short order, just in time to mark the bicentennial of the country's first constitution adopted in May 1791.[210] But the realities of constitution-making quickly intervened to depress hopes for a rapid transition, as it soon became clear that it would take much longer than two years to enact a new constitution.

What had once seemed like a promising path to expeditious and successful constitution-making—to have Parliament write the draft and the people subsequently ratify it in a nationwide referendum—turned into a dead end when the two chambers of Parliament failed to agree on a draft.[211] Each house produced its own inconsistent version: the Sejm proposed a parliamentary system, while the upper house preferred a presidential system.[212] Parliament had to find another path forward. Political actors laid the foundation for a rocky period of incremental constitution-making within a longer evolutionary transition away from their communist-era constitution.[213]

2. A Preliminary Constitution

The fulcrum of the Polish constitutional transition was what became known at the time as the "Little Constitution" or the "Small Constitution," a constitutional text enacted in 1992 as an intermediate step toward a new constitution.[214] Equal in status to the texts comprising the Polish

[209] Andrzej Balaban, Developing a New Constitution for Poland, 41 Clev. St. L. Rev. 503, 505, 508–09 (1993).

[210] Rett R. Ludwikowski, Constitution Making in the Countries of Former Soviet Dominance: Current Development, 23 Ga. J. Int'l & Compar. L. 155, 191 (1993).

[211] Wiktor Osiatynski, Poland's Constitutional Ordeal, 3 E. Eur. Const. Rev. 29, 30 (1994).

[212] Id.

[213] Karol Edward Soltan, Constitution Making at the Edges of Constitutional Order, 49 Wm. & Mary L. Rev. 1409, 1414–15 (2008).

[214] Mark Brzezinski, The Struggle for Constitutionalism in Poland 2 (1998). The "Small Constitution" was officially enacted as the "Constitutional Statute of 17 October 1992 on mutual relations between the legislative and executive power in the Republic of Poland and

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Constitution, the Small Constitution operated alongside the 1952 Constitution, some of whose provisions were abrogated while others remained in force.[215] It did not replace the existing constitution. As is standard operating procedure in jurisdictions with multi-textual constitutions, it was one of multiple texts of higher law in force at the same time.

The Small Constitution codified the relationship among the executive, legislative, and judicial branches. It sought to "reestablish the tripartite system, as well as the balance between them,"[216] an unmistakable repudiation of the prior communist doctrine of the unity of state power.[217] The Small Constitution explained in its text that "legislative power shall be vested in the Sejm and the Senate of the Republic of Poland and the Council of Ministers, and judicial power shall be vested in independent courts."[218] As a former Polish Prime Minister acknowledged, it is not uncommon to recognize the separation of powers as a constitutional principle in the democratic countries of the world, but when it was ultimately codified in Poland's new constitutional document, "Its value consisted in the fact that the principle of separation of powers was expressly formulated, thereby becoming a constitutional principle and symbolizing a return to Poland's democratic traditions."[219]

The Small Constitution did not, however, resolve the major legal and political challenges in Poland.[220] Nor did it address rights and freedoms,[221] preferring instead to leave these matters to resolution on a

on the local self-government." Mirosław Granat & Katarzyna Granat, The Constitution of Poland: A Contextual Analysis 12 n.30 (2019).

[215] Bogumił Szmulik & Jarosław Szymanek, Introduction to the Constitution of the Republic of Poland 19 (2020).

[216] See Grzegorz Górski, Constitutional Changes in Poland Between 1989 and 1997, 1 Law & Admin. Post-Soviet Eur. 5, 11 (2014).

[217] Ewa Łętowska, Courts and Tribunals Under the Constitution of Poland, 1997 St. Louis-Warsaw Transatlantic L.J. 69, 74.

[218] Hanna Suchocka, Checks and Balances Under the New Constitution of Poland, 1998 St. Louis-Warsaw Transatlantic L.J. 45, 48 (quoting Ustawa Konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym [Constitution] art. 1 (Pol.)).

[219] Id.

[220] Piotr Winczorek, Axiological Foundations of the Constitution of Poland, 1997 St. Louis-Warsaw Transatlantic L.J. 59, 60.

[221] Wiktor Osiatynski, A Bill of Rights for Poland, 1 E. Eur. Const. Rev. 29, 29 (1992).

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parallel track of constitution-making.[222] The Small Constitution had never been intended as a constitutional destination. It had always been viewed as an interim constitutional document—just one step in the country's journey to a new constitutional settlement, whenever that moment would arrive.[223] Created to alleviate the tensions among ruling elites and to make collaboration possible between the president and the parliamentary majority, the Small Constitution was a vehicle for temporary constitutional peace.[224] Provisional and contingent, the Small Constitution bought the country time while political actors crafted the terms for what was hoped would be a more permanent bargain.[225] In the end, Poland adopted a new constitution in 1997.[226] This new higher law replaced the multiple documents that had, at the time, comprised the Constitution of Poland, including the 1952 Constitution and the Small Constitution of 1992.[227]

3. A Familiar Pattern

The constitution-making process leading to the enactment of the 1997 Polish Constitution followed the pattern established eight decades prior. After the restoration of its independence in 1918, Poland launched a process to enact a new constitution.[228] The new constitution came into force in 1921, two years after the creation of the Small Constitution of 1919, which set the foundation for the new system of government.[229]

[222] For a discussion of the contemporaneous parallel negotiations on a bill of rights, see Andrzej Rzeplinski, The Polish Bill of Rights and Freedoms: A Case Study of Constitution-Making in Poland, 2 E. Eur. Const. Rev. 26, 27 (1993).

[223] See Wojciech Sadurski, Poland's Constitutional Breakdown 41 (2019).

[224] Lech Garlicki & Zofia A. Garlicka, Constitution Making, Peace Building, and National Reconciliation: The Experience of Poland, *in* Framing the State in Times of Transition: Case Studies in Constitution Making 391, 402 (Laurel E. Miller & Louis Aucoin eds., 2010); Brzezinski, supra note 214, at 98–105.

[225] See Daniel H. Cole, From Renaissance Poland to Poland's Renaissance, 97 Mich. L. Rev. 2062, 2093 n.104 (1999).

[226] The text of the new constitution expressly declares it has "hereby repealed" the Small Constitution of 1992, as well as another constitutional law that had been adopted a few months before the Small Constitution to formalize the procedure for ultimately adopting the new Polish Constitution. Konstytucja Rzeczypospolitej Polskiej [Constitution] Apr. 2, 1997, art. 242 (Pol.).

[227] Id.

[228] Daniel H. Cole, Poland's 1997 Constitution in Its Historical Context, 1998 St. Louis-Warsaw Transatlantic L.J. 1, 21.

[229] Krzysztof Prokop, The System of Government Under the Small Constitution of 1919, 6 Przegląd Prawa Konstytucyjnego [Const. L. Rev.] 55, 55–56 (2018).

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A similar process took hold in Poland after the Second World War. In a period of intense constitutional change that ultimately led to the replacement of the 1935 Polish Constitution with the 1952 Constitution, the new Polish higher law was a communist constitution designed in the style of Soviet constitutionalism.[230] But before the enactment of this new postwar constitution, political actors enacted the Small Constitution of 1947.[231] The government of Poland created it as a temporary organic law to establish a body known as the State Council that could exercise supreme lawmaking power in the long periods between the sessions of the Sejm.[232]

This recurring Polish practice of enacting "small constitutions" may be evidence of what scholars have described as the impermanence of Polish constitutionalism.[233] It may alternatively reveal a preference for incremental constitutional change over big-bang moments of radical constitutional transformation.

Moreover, the Polish pattern of using multi-textuality in the context of a constitutional transition suggests an intriguing option for constitution-making. Rather than launching a constitution-making effort against the backdrop of the existing and presumably suboptimal constitution, the Polish pattern of adopting a framework constitutional act—either as a preliminary step before embarking on the effort to replace the constitution or as part of a negotiated constitutional transition—can help mitigate the risks inherent in constitution-making. The contents of such a framework constitutional act would, of course, have to depend on the needs and peculiarities of the jurisdiction. For instance, certain groups or interests might require assurances codified in the constitutional act in return for their agreement to participate in or support the constitution-making

[230] See Ryszard Cholewinski, The Protection of Human Rights in the New Polish Constitution, 22 Fordham Int'l L.J. 236, 243 (1998).

[231] Richard F. Staar, Legislative Foundations of Contemporary Poland, 6 Slavic & E.-Eur. Stud. 62, 64 (1961).

[232] Id.

[233] See Marek Dobrowolski & Dorota Lis-Staranowicz, (Im)permanence of Polish Constitutionalism: In Search of an Optimal Vision of the State, *in* Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries 89, 106 (Lóránt Csink & László Trócsányi eds., 2022) (observing that "the legal solutions of the period of political transformations, which were intended to be of a temporary nature, became a permanent component of constitutionalism in Poland").

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process.[234] Perhaps amnesty or immunity might be granted to warring factions in the context of a constitutional transition from war to peace.[235] In precarious circumstances like these, multi-textuality raises many possibilities for shepherding the constitution-making process to successful fruition. Specifically, multi-textuality can act both as a safety valve to relieve the immediate pressures of an intense constitutional transition and as a springboard to achieve its long-term objectives.

B. Constitutional Flexibility

Multi-textuality can therefore be useful in periods of constitutional transition. Multi-textuality can be an equally effective aid for assuaging the difficulty of constitutional amendment. Of course, the form alone of a constitution does not dictate its flexibility or rigidity. Just as political practices may overcome what appears on paper to be rigid amendment rules, easy amendment rules on paper may thwart the best efforts of political actors in practice.[236] Multi-textual constitutions can therefore be just as easy, or difficult, to amend as uni-textual constitutions. But because multi-textual constitutions invite innovation in constitutional reform, they open alternative avenues for constitutional change that allow political actors to dissolve a long-standing stalemate or to otherwise mitigate amendment difficulty. The point is not that multi-textual constitutions are always easy to amend. It is rather that they inspire creative solutions to constitutional rigidity.

[234] An instructive comparison may be made to the Canadian constitutional guarantee of a public subsidy for religious denominational instruction in the Constitution Act, 1867. See supra text accompanying notes 197–200.

[235] For a discussion of amnesty and immunity in reconciliatory constitutional design in Africa, see Richard Albert, Constitutional Handcuffs, 42 Ariz. St. L.J. 663, 693–98 (2010).

[236] The main determinant in amendment difficulty is what has been called "amendment culture." See Tom Ginsburg & James Melton, Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty, 13 Int'l J. Const. L. 686, 699–701 (2015). The Mexican Constitution, for example, is among the world's most amended constitutions despite codified amendment rules that would suggest the opposite. See Andrea Pozas-Loyo, Camilo Saavedra-Herrera & Francisca Pou-Giménez, When More Leads to More: Constitutional Amendments and Interpretation in Mexico 1917–2020, 2022 Law & Soc. Inquiry 1, 8.

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1. The Standard Design

The standard design of amendment procedures is evident in the United States. The 1781 Articles of Confederation authorized constitutional amendments according to this onerous procedure requiring unanimity:

> [T]he Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterward confirmed by the legislatures of every state.[237]

This procedure specifies only one way to amend the higher law of the United States. It requires proposal by the Congress and then approval by each of the thirteen states in the Union.[238] We can describe this structure of amendment design as "single-track" because it offers a single legal path to constitutional reform—only one way to initiate an amendment and only one way to ratify it.[239]

2. Amendment Tracks in Uni-Textual Constitutions

This standard design endures still today across legal traditions. In Germany, the Basic Law authorizes amendments only where a bill first proposed in the national legislature is "carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat."[240] The Basic Law therefore specifies one legal procedure alone to modify Germany's higher law. The same is true of the Japanese Constitution. The single-track amendment procedure in Japan requires several steps: an amendment may be initiated only by a two-thirds vote of the bicameral national legislature, it may be ratified only by majority vote in a national referendum, and it may then be promulgated only by the Emperor.[241]

Modern amendment design is more complex than this standard design. Some modern constitutions use multi-track procedures that create many avenues to initiate or ratify an amendment. The Kenyan Constitution, for

[237] Articles of Confederation of 1781, art. XIII.

[238] Id.

[239] Richard Albert, The Structure of Constitutional Amendment Rules, 49 Wake Forest L. Rev. 913, 936 (2014).

[240] Grundgesetz [GG] [Basic Law], art. 79(2) (Ger.) (translation available at https://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/7KEG-BNRF]).

[241] Nihonkoku Kenpō [Kenpō] [Constitution], art. 96 (Japan).

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instance, authorizes either the people or members of Parliament to initiate an amendment.[242] The Constitution of Lesotho similarly creates two paths to constitutional reform: first, proposal and ratification in Parliament, followed by assent by the monarch; or, alternatively, proposal in Parliament, ratification in a national referendum, and assent by the monarch.[243] Likewise, the South Korean Constitution separately assigns the power to initiate an amendment to either a majority of the national legislature or the president.[244] These and other examples of multi-track amendment procedures improve on the standard design by distributing the initiation and ratification power across different actors in order to avoid the problem of obstruction, which is inherent in the standard single-track design. Unlike the standard design which empowers a lone institutional actor to block any and all amendments, the modern multi-track design ensures that at least one additional path exists to initiate a lawful constitutional reform.

3. Multi-Track Amendment in Multi-Textual Constitutions

Multi-textual constitutions offer advantages similar to multi-track amendment procedures because they authorize more than just one way to amend the constitution. Each of the three models of multi-textual constitution-making discussed in Part I—the model of authorization as exhibited in Italy, conditionality as in Azerbaijan, and enumeration as in Lithuania—illustrate the point.[245]

In the Italian multi-textual constitution-making model of authorization, the two available paths to lawful constitutional change—constitutional amendment and constitutional laws—allow political actors to choose which option best serves their interests in formalizing a given change.[246] If incumbents prefer to leave unaltered either the founding constitutional document or the text of an existing constitutional law, they may choose instead to create a new document that has the same constitutional status but that exists physically detached from any other document of higher law. Alternatively, incumbents may well prefer to modify the actual document of the founding higher law, in which case they may enact a constitutional amendment that will alter, add to, remove from, replace, or

[242] Constitution arts. 255–57 (2010) (Kenya).
[243] Constitution art. 85 (1993) (Lesotho).
[244] Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 128 (S. Kor.).
[245] See supra Subsection I.B.1.
[246] See Art. 138 Costituzione [Cost.] (It.).

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reorder the text. Each of these forms of constitutional change are equal in their legal effect, and each may be enacted using the same legal procedure.[247] But the key point is the innovation possible with multi-textuality: the Italian Constitution, like many other multi-textual constitutions, gives political actors the choice to enact a separate self-standing constitutional document or to alter an existing one, according to their needs and preferences.

The same is true of the multi-textual constitution-making models of conditionality and enumeration in Azerbaijan and Lithuania, respectively. In Azerbaijan, political actors may choose either to amend the constitution, to amend a self-standing higher law, or to create a new, separate, self-standing constitutional law.[248] These forms of change are equal in legal status, but they require different procedures to enact.[249] They offer political actors the same flexibility available to Italian political actors: they may choose either to change the meaning of the constitution by altering the text of an existing higher law or by leaving that text unaltered and adopting a new constitutional document that will operate with equal weight alongside existing constitutional texts. In Lithuania, the enumeration of the constitution's documents of higher law opens the door to constitutional changes that either alter the text of the founding higher law, modify the text of other enumerated higher laws, or create an altogether new document of higher law of equal legal status.[250]

This flexibility in multi-textual constitutions can serve political actors well. Consider a jurisdiction where there is an urgent need to update the constitution in order to meet a present or looming challenge, but the founding document of higher law is held in such high regard that there is

[247] Id.

[248] See supra text accompanying notes 47–51.

[249] See supra text accompanying notes 47–51.

[250] See supra text accompanying notes 52–54. The people may enact a new constitution, but they are subject to a substantive limitation on the creation of a new constitution, according to the Constitutional Court of Lithuania: the "fundamental constitutional acts of the State of Lithuania, as the primacy sources of Lithuanian constitutional law, may never be altered or repealed." Ruling on the Compliance of the Republic of Lithuania's Law on Referendums (Wording of 20 December 2018) with the Constitution of the Republic of Lithuania and the Constitutional Law, Const. Ct. Republic Lith. § 6.4 (July 30, 2020), https://lrkt.lt/data/public/uploads/2020/09/2020-07-30_kt135-n11_ruling.pdf [https://perma.cc/EQ3R-J47E] (translating Nutarimas Dėl Lietuvos Respublikos Referendumo Įstatymo (2018 M. Gruodžio 20 D. Redakcija) Atitikties Lietuvos Respublikos Konstitucijai Ir Konstituciniam Įstatymui, No. KT135-N11/2020, 3(59) Konstitucinė Jurisprudencija 84, § 6.4 (July 30, 2020), https://lrkt.lt/data/public/uploads/2021/10/jurisprudencija-nr.-3-59-2020-web.pdf [https://perma.cc/L68A-27Z9]).

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significant popular and political resistance to making alterations to its existing form. In this case, the widespread reverence for the founding text stands as a barrier to lawful constitutional change. But the possibility of updating the constitution through another equally effective method—in the case of multi-textual constitutions, by enacting a new constitutional document of equal legal force—helps ensure both that the founding text will remain unchanged and that the constitution will be updated in a way that abides by the reform procedures codified in the constitution.

C. Constitutional Veneration

In addition to making possible new strategies in the resolution of conflicts and to opening new avenues in constitutional reform that could alleviate the rigidity of an amendment procedure, multi-textuality could perhaps mitigate a third problem associated with uni-textual constitutions: constitutional veneration. To be sure, there is nothing inherently unhealthy in a democracy about admiring one's constitution and honoring its beginnings. But as with many good things, an overabundance can be harmful. The threshold separating constitutional admiration from veneration is crossed when affection for the constitution entails blind faith and an impulsive attachment to it. Multi-textuality may be a useful strategy to guard against the onset of constitutional veneration.

1. The Costs and Benefits of Constitutional Revision

The problem of constitutional veneration is particularly pronounced in the United States. This is perhaps no surprise, given that the U.S. Constitution was written in 1787, well over two centuries ago.[251] Constitutional endurance and constitutional veneration are intimately related: the longer a constitution survives, the more it inspires attachment, respect, and dependency. This condition may infect all constitutional forms, but my hypothesis is that uni-textual constitutions are especially susceptible to the ills of constitutional veneration.

In the early years of the new American republic, Thomas Jefferson anticipated the problem of constitutional veneration and proposed a way to forestall it. Jefferson suggested that a constitution should be designed to require its revision periodically every generation, both to give the

[251] U.S. Const. (attestation clause) (stating that the Constitution was "[d]one in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven").

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governed of the present moment a chance to shape the rules that bind them and also to pass on to the next generation a well-working constitution that had been kept up-to-date in light of learned experience.[252] "[E]ach generation," Jefferson wrote, "is as independant [sic] of the one preceding, as that was of all which had gone before. [I]t has then, like them, a right to chuse [sic] for itself the form of government it believes most promotive of it's [sic] own happiness."[253] Keeping the same constitution unchanged and unadapted to the times made little sense to him. Jefferson remarked that "we might as well require a man to wear still the coat which fitted him when a boy"[254] and insisted that "institutions must go hand in hand with the progress of the human mind" because "as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."[255]

For Jefferson, the generational right of constitutional revision was necessary for both intrinsic and instrumental purposes. As he explained, "it is for the peace and good of mankind that a solemn opportunity of doing this every 19. or 20. years should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation to the end of time."[256] His unconventional proposal that the people should engage in regular revision of their constitution would serve the twin interests of generational independence and generational interdependence: the former by giving each generation the power to revise the constitution to suit its own needs and to live according to its values; and the latter by specifying regular intervals for one generation to take responsibility for repairing discovered flaws in the constitution before passing the text onto the next generation.

There was a deeper concern behind Jefferson's suggestion that constitutions should be revised every generation. Constitutions should not be treated as objects of perfection, he cautioned. Holding constitutions in too high regard would risk hoisting them "beyond amendment."[257] Of course, as Jefferson knew well, no constitution is ever finished at the

[252] Letter from Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval) (July 12, 1816), https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002 [https://perma.cc/7PYH-TBWR].

[253] Id.

[254] Id.

[255] Id.

[256] Id.

[257] Id.

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moment of creation, and problems will reveal themselves over its lifetime. Jefferson understood that some design defects could be tolerated and assimilated into the operation of government.[258] He observed also that other defects would require closer scrutiny and subsequent action to reverse their negative effects on the polity.[259] Yet for him, the overriding purpose for generational revision was to avoid the onset of constitutional veneration. Jefferson was concerned about constitutions growing to loom so large in the popular imagination that they command something in the nature of a religious fealty: "Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched. [T]hey ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."[260] This was the problem Jefferson sought to thwart with this idea of generational revision. He wished the constitution would be a tool to serve the needs of the present, not a straitjacket for the deceased to rule the living.[261]

But the United States ultimately chose a path that would later aggravate, rather than alleviate, the problem of constitutional veneration. That choice was to privilege constitutional endurance over replacement and to keep constitutional amendment rare. The chief proponent of that choice was James Madison. When he objected to a proposal calling for the people to gather in a constitutional convention to consider revising the Constitution on the agreement of any two of the three branches of government, Madison expressed his concern about too frequently engaging the people in constitutional reform. He acknowledged that "the people are the only legitimate fountain of power,"[262] but he worried that "every appeal to the people would carry an implication of some defect" in the Constitution itself.[263] Madison thought it would be harmful to suggest that the Constitution needed repair.[264] The implication of a defective constitution would undermine the goal of fostering

[258] Id. ("I think moderate imperfections had better be borne with; because when once known, we accomodate [sic] ourselves to them, and find practical means of correcting their ill effects.").

[259] Id.

[260] Id.

[261] Id.

[262] The Federalist No. 49, supra note 13, at 339 (James Madison).

[263] Id. at 340.

[264] Id.

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constitutional veneration, which for Madison was a key ingredient to the success of the republic:

> [F]requent appeals would in great measure deprive the government of that veneration, which time bestows on every thing, [sic] and without which perhaps the wisest and freest governments would not possess the requisite stability.[265]

Madison's point was not that the Constitution should never be amended. It was that too much amendment would weaken its public acceptance. Keeping the Constitution stable rather than ever-changing would yield a more durable constitution, and it would give the people reassurance of the Constitution's careful design, able performance, and resilient capacity to endure well into the future. For Madison, then, veneration was the objective—the very same objective Jefferson rejected as dangerous.[266] What Madison had projected to be a strength, Jefferson believed would be a weakness.

2. The American Experience

Today, with the benefit of many generations of experience under the same uni-textual document written long ago in 1787, we can assess whether Jefferson was right to caution against constitutional veneration. In his classic book on constitutional reform in the United States, Sanford Levinson sides with Jefferson.[267] Among Levinson's reasons why, three stand out as compelling evidence that the problem of constitutional veneration has taken a substantial toll on the country: the rise of a constitutional status quo bias against amending the United States Constitution, the difference in levels of amendment activity in the states versus at the national level, and the structural stasis of the Constitution despite the astonishing proliferation of informal amendment.[268] I elaborate on each of these three Levinsonian points below.

Recalling Madison's preference for a constitution that would endure, Levinson describes Madison as treating the year 1787 "almost as a

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[265] Id.

[266] See supra note 252.

[267] See Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) 17 (2006) [hereinafter Levinson, Our Undemocratic Constitution]. Levinson wrote about the problem of constitutional veneration in an earlier classic. See Sanford Levinson, Constitutional Faith 9–11 (1988).

[268] See infra text accompanying notes 269–85.

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miraculous and singular event," adding that "[h]ad he been a devotee of astrology, he might have said that the stars were peculiarly and uniquely aligned" to create something quite special.[269] There is a consequence to believing the Constitution is sacred: it generates a disinclination to make any changes to it. And indeed scholars have uncovered proof that the intense attachment Americans have for the Constitution has generated a "constitutional status quo bias" causing them to resist proposals that would revise or replace it.[270] It is no wonder, then, that although seventy-five percent of Americans support overturning the Supreme Court's controversial ruling on campaign finance, no constitutional amendment to reverse it has yet to succeed.[271] This is the constitutional status quo bias at work: keep your hands off the Constitution.

Levinson believes Jefferson was correct, but he concedes that Madison's vision for a venerated constitution has prevailed.[272] The U.S. Constitution has been amended so infrequently relative to its age—twenty-seven amendments since 1789—and its low rate of amendment becomes undeniable when compared to the tradition of frequent amendment in the states. As Levinson explains, "[T]he measure of Madison's success is clearest if one contrasts the history of the national Constitution with those of the various states,"[273] whose constitutions reveal "an almost unceasing history not only of constitutional amendment—that is, additions or deletions from the foundation document—but of outright substitution of new constitutions for those now deemed inadequate."[274] Data have confirmed that the average annual revision rate is considerably higher for state constitutions than the U.S. Constitution: 0.35 for the former, 0.07 for the latter.[275] All of which leads

[269] Levinson, Our Undemocratic Constitution, supra note 267, at 17.

[270] See James R. Zink & Christopher T. Dawes, The Dead Hand of the Past? Toward an Understanding of "Constitutional Veneration," 38 Pol. Behav. 535, 537, 553, 556 (2015).

[271] See Steven Kull, Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide 7 (2018), https://publicconsultation.org/wp-content/uploads/reports/Campaign_Finance_Report_May2018.pdf [https://perma.cc/68AF-8HFF]. The Supreme Court case is *Citizens United v. Federal Election Commission*, 558 U.S. 310, 319, 371 (2010), which held that campaign donations are political speech protected by the First Amendment.

[272] Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 Tex. Tech. L. Rev. 2443, 2455 (1990) [hereinafter Levinson, "Veneration" and Constitutional Change].

[273] Id. at 2454.

[274] Id.

[275] Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited, 81 U. Chi. L. Rev. 1641, 1674–75 (2014).

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Levinson plausibly to remark that "[i]t is certainly difficult to describe the stance of most citizens toward their state constitutions as one of 'veneration.'"[276] For Levinson, only the national constitution suffers from this affliction; state constitutions appear immune to it.

Yet Levinson recognizes that popular veneration does not freeze the Constitution. Its text may now be virtually unchangeable, but its authoritative meaning is not. As he explains, "[S]ome significant change functionally similar to 'amendment' has occurred informally, outside of the procedures set out by Article V."[277] Some of those informal amendments have occurred by judicial interpretation. The Court has given the country great victories in rights and freedoms, most resoundingly in repealing the laws of segregation.[278] But, for Levinson, these victories have come at a cost: it is precisely rulings like these, in which "the Supreme Court spoke in the name of the Constitution,"[279] that reinforce the popular veneration of the document itself "in all respects."[280]

Here is what troubles Levinson most of all: the Constitution can change quite easily by judicial interpretation when it comes to rights and liberties, but the Constitution is impossible to change by judicial interpretation when it comes to its core structural elements. In Levinson's view, these constitutional structures include the Electoral College,[281] the Equal Suffrage Clause,[282] and life tenure for Justices of the Supreme Court,[283] to name a few of the examples he identifies. Levinson describes these features as the "hard-wired" parts of the Constitution that are resistant to alteration by judicial interpretation.[284] The Court cannot reinterpret the Electoral College to require the president to be chosen in a national popular election, for instance, nor can the Court reinterpret the Equal Suffrage Clause to reconfigure the Senate according to proportional representation or to impose term limits on federal judges. For Levinson, the permanence of hard-wired constitutional structures results in stasis on the matters he believes most urgently need reform.[285]

[276] Levinson, "Veneration" and Constitutional Change, supra note 272, at 2455.
[277] Levinson, Our Undemocratic Constitution, supra note 267, at 22.
[278] See generally Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[279] Levinson, Our Undemocratic Constitution, supra note 267, at 20.
[280] Id.
[281] Id. at 82.
[282] Id. at 49, 62.
[283] Id. at 124.
[284] Id. at 29.
[285] Id.

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3. Practice and Precedent

There is nothing in the formal design of the United States Constitution that requires it to be either uni-textual or multi-textual. Just as a multi-textual constitution can evolve over time into a uni-textual constitution, a uni-textual constitution can evolve over time into a multi-textual form. But there is a peculiar barrier standing in the way of that transformation ever happening in the United States: the U.S. Constitution has retained its popular perception as a uni-textual document due to an early constitutional practice that has grown today into a constitutional expectation.

A pivotal decision in the First Congress of the United States explains why the Constitution operates as uni-textual. Congresspersons at the time confronted an important question of constitutional form: How should the Constitution record that it has been amended?[286] They debated two methods of amendment codification. One option was to intersperse amendments into the original text of the constitution.[287] This method of codification would require rewriting the words chosen by the Philadelphia Convention. The First Congress chose an alternative method: to keep amendments separate from the founding Constitution, leaving the original text untouched and unchanged, on the theory that "[t]he constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments."[288] The First Congress worried that integrating amendments into the original constitutional text would risk undermining the authority on which the Constitution itself rested.[289] Roger Sherman cautioned that if the First Congress were to choose to put amendments directly into the original text, "[W]e might as well endeavor to mix brass, iron, and clay, as to incorporate such heterogeneous articles; the one contradictory to the other."[290]

Since then, the practice of enumerating amendments separately from the original text has endured. Constitutional amendments enacted after the First Amendment have followed the precedent of separation set by the First Congress. Today, when we read the U.S. Constitution—in government publications, on websites published by public or private organizations, in high school civics textbooks, in pocket-sized versions

[286] See Albert, supra note 84, at 231–33.
[287] Id. at 232.
[288] 1 Annals of Cong. 735 (1789) (Joseph Gales ed., 1834).
[289] Id.
[290] Id. at 734–35.

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sold or distributed freely—we see quite clearly the separation between the founding document and subsequent amendments. The original document appears first in full, and each subsequent amendment appears at the end of the founding text—but as part of the same document—in order of the date of its ratification.[291] These publications sustain the public perception of the Constitution as a uni-textual document.

Given that the U.S. Constitution is widely presented as a uni-textual document, America and the world have grown accustomed both to seeing and treating it as the standard form of a single-text constitution. Its appearance has entailed consequences for constitutional veneration.

First, it was not happenstance that the Constitution was written down on parchment, and even less so that it was written down in what has been presented to Americans as a single comprehensive text. This format was a strategic choice to seize on the tradition of textuality that was rooted in the reverence early Americans had for texts, especially for religious writings.[292] Early state constitutions had been codified in a single document of higher law,[293] leading Thomas Paine to describe one of them as a "political bible."[294] Paine did not make this biblical comparison lightly. He had observed that "[s]carcely a family was without it."[295] In the everyday happenings of politics, "[e]very member of the government had a copy."[296] And "nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and

[291] See, e.g., The Constitution of the United States of America, Libr. of Cong., https://tile.loc.gov/storage-services/public/gdcmassbookdig/constitutionofun00unit_9/constitutionofun00unit_9.pdf [https://perma.cc/JF88-TXJK] (last visited Oct. 28, 2023); Constitution of the United States, U.S. Cong., https://constitution.congress.gov/constitution [https://perma.cc/QF6X-L8HR] (last visited Oct. 28, 2023); The United States Constitution, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/full-text [https://perma.cc/ZG98-LNPG] (last visited Oct. 28, 2023).

[292] Wayne Franklin, The US Constitution and the Textuality of American Culture, *in* Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution 9, 9–11 (Vivien Hart & Shannon C. Stimson eds., 1993).

[293] See, e.g., Pa. Const. (promulgated Sept. 28, 1776); Ga. Const. (promulgated Feb. 5, 1777); S.C. Const. (promulgated Mar. 26, 1776).

[294] 2 Thomas Paine, Rights of Man, Part II. Combining Principles and Practice, *in* The Political Writings of Thomas Paine 145, 181 (1856).

[295] Id.

[296] Id.

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read the chapter with which such matter in debate was connected."[297] This state model inspired the drafting of the national constitution.[298]

Moreover, the Constitution was designed to be short and accessible. The text is "singularly brief and expressive,"[299] to quote Joseph Story, and also "[p]lain to the point of severity, frugal to the point of austerity, [and] laconic to the point of aphorism."[300] This parsimony was a deliberate choice of the Philadelphia Convention. The Constitution had "to be compact enough so that ordinary citizens in 1787 could read it from start to finish."[301] The Bill of Rights was written likewise "to facilitate popular memorization, encompassing easily remembered and internalized maxims of government, pithily put."[302] The Constitution's brevity, readability, and quick reference format as a self-contained document combined over time to build reader confidence and loyalty.[303]

Now consider the opposite. Were the U.S. Constitution seen and treated as a multi-textual constitution, it would likely not attract the same extreme veneration that Americans have today for it. Were it understood to be disaggregated across several documents—with amendments scattered in their own constitutional documents, and also with several acts promulgated self-consciously as constitutional laws of status equal to the original constitution[304]—America's multi-textual constitution would probably have been longer, it would likely have been somewhat disorganized, and it would almost certainly have been less accessible to everyday Americans. This multi-textuality would have had a negative impact on constitutional veneration, according to the results of a key study

[297] Id.

[298] See Max Farrand, The Framing of the Constitution of the United States 126, 203–04 (1913) (explaining that the Constitution was "fitted together into a single harmonious document," that the Philadelphia delegates "relied almost entirely upon what they themselves had seen and done," and that they "were dependent upon their experience under the state constitutions and the articles of confederation").

[299] Joseph Story, The Science of Government, *in* The Miscellaneous Writings of Joseph Story 614, 622 (William W. Story ed., 1852).

[300] Clinton Rossiter, 1787: The Grand Convention 258 (1966).

[301] Akhil Reed Amar, Architexture, 77 Ind. L.J. 671, 676 (2002).

[302] Id. at 676–77.

[303] See Richard D. Brown, The Ideal of the Written Constitution: A Political Legacy of the Revolution, *in* Legacies of the American Revolution 85, 87 (Larry R. Gerlach, James A. Dolph & Michael L. Nicholls eds., 1978) (arguing that the Constitution's length, among other features, has allowed for duration and flexibility across generations).

[304] See generally Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications (Richard Albert & Joel I. Colón-Ríos eds., 2019) (drawing from comparative constitutional experience to illustrate how statutes can acquire constitutional status).

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showing that constitutional familiarity is a decisive source of constitutional approval in the United States.[305]

The Austrian constitutional experience suggests as much. The multiplication of separate, self-standing constitutional laws with status equal to the founding document has kept the Austrian Constitution from achieving the public salience that it might have had as a uni-textual document.[306] And because "Austrians never were nor will be able to have 'their' constitution presented in a handy little book," the Constitution has "failed to become an integral part of Austrian society."[307]

Back to the U.S. Constitution: Would its perception and treatment as a multi-textual higher law prevent its veneration? This would make it difficult for anyone but the most well-informed persons to point to the thing commonly identified as *the* constitution. Multi-textuality would make it harder for Americans to build as intimate a connection with the Constitution as they have now thanks to its widespread accessibility and association as a uni-textual document. This alternative constitutional form could perhaps also moderate popular identification and familiarity with the Constitution, and accordingly temper popular pride in its ownership.

CONCLUSION: IS THE U.S. CONSTITUTION MULTI-TEXTUAL?

In contrast to what is understood to be the standard model of uni-textual constitutions, many constitutions are multi-textual, as I have shown in this Article. They consist of several documents of higher law, each text enjoying shared constitutional supremacy and often, though not always, enacted asynchronously. I have shown that constitutions can be designed as multi-textual from the very beginning. I have shown also that constitutions can evolve over time into multi-textuality after their initial enactment as uni-textual. And drawing from the global constitutional experience, I have shown that multi-textual constitutions operate in every part of the world—including in both civil and common law countries, presidential and parliamentary systems, as well as in all types of political regimes, from monarchies to republics—and that they exist in constitutional states both young and old. Given the ubiquity of multi-

[305] Nicholas O. Stephanopoulos & Mila Versteeg, The Contours of Constitutional Approval, 94 Wash. U. L. Rev. 113, 158 (2016).

[306] Manfred Stelzer, The Constitution of the Republic of Austria: A Contextual Analysis 22 (2011) (observing that "the constitution failed to become an integral part of Austrian society").

[307] Id.

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textuality, it is surprising that multi-textual constitutions have yet to be identified and theorized as a distinct constitutional form.

Now that we understand the form and operation of multi-textual constitutions, the U.S. Constitution might well begin to look somewhat less uni-textual and more multi-textual.[308] One need only compare how its amendments are commonly presented in society with how they are actually made under law. In freely accessible versions of the U.S. Constitution published online and in print by both public and private actors, the Constitution is presented as a single document, with the founding text followed by each amendment in order of its ratification. This has created and reinforced the perception that the U.S. Constitution is and always has been a single, unified, structurally self-contained document that has grown longer and longer with the ratification of each amendment since the founding. But this conventional view is incorrect.

Here is the revelation: none of the twenty-seven amendments to the Constitution since its enactment in 1789 has ever been inscribed chronologically to the end of the original parchment. Each constitutional amendment has instead been enacted separately over time as a self-standing document of its own that is physically unconnected to the founding text of the Constitution.[309] In fact, there are laws governing how the Constitution is "edited" when it is amended. For example, upon the ratification of an amendment, the Archivist of the United States must certify its ratification in the Statutes at Large.[310] The publication of this

[308] Though it is not presently my view, one could argue that the Declaration of Independence is a constitutional document, given that Supreme Court Justices have cited it as higher law. See supra note 14. In addition, although it is not my view, one could treat "super-statutes" as comparable to constitutional amendments in multi-textual jurisdictions. See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1267–71 (2001). An example is the Civil Rights Act of 1964, enacted by Congress in a period of intense national debate on whether and how to formalize antidiscrimination rules. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Political actors at the time self-consciously decided against using the constitutional amendment rules in Article V, opting instead to enact the Civil Rights Act as a "landmark statute" using sub-constitutional legislative procedures. See 3 Bruce Ackerman, We the People: The Civil Rights Revolution 83 (2014). This is perhaps no surprise, as amending the U.S. Constitution via Article V is virtually impossible today, and has been for quite some time. See Richard Albert, The World's Most Difficult Constitution to Amend?, 110 Calif. L. Rev. 2005, 2013–16 (2022) (explaining why formal constitutional amendment is today virtually impossible using the procedures of Article V).

[309] See U.S. Const. amends. XXVII, XXVI, XXV, XXIV, XXIIV, XXII, XXI, XX, XIX; id. amend. XVIII, *repealed by* id. amend. XXI; id. amends. XVII, XVI, XV.

[310] 1 U.S.C § 106b. Today this role belongs to the Archivist of the United States, but in the past it has belonged separately to the Administrator of General Services and the Secretary of

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certification "shall be legal evidence of . . . ratified amendments to the Constitution of the United States."[311] No concurrent or subsequent act is required to append amendments to the document promulgated in 1789. Nor has such an act even been contemplated: the original constitutional text has long been on display under protective glass in the Rotunda at the National Archives Museum in Washington, D.C. It remains unchanged in its words, unaltered on its parchment, and frozen in its original form.

Contrary to popular perception both in the United States and the world, then, the U.S. Constitution therefore appears to be multi-textual. It consists of several constitutional documents, each one situated on an equal plane of constitutional supremacy. As a matter of legal form, the U.S. Constitution is a compilation of higher laws that includes at least the original document written at the Philadelphia Convention and its subsequent amendments, each of them enacted as separate constitutional laws that appear in documents detached from the Constitution.

Armed with this insight into how amendments to the U.S. Constitution are promulgated, we can now return to the three basic legal features that distinguish multi-textual constitutions from uni-textual constitutions to inquire whether the Constitution should be treated as multi-textual.[312] On the first legal criterion—multiplicity—the U.S. Constitution contains at least twenty-eight documents: the founding constitutional text plus each of the twenty-seven amendments enacted through Article V, though one amendment has been repealed by another.[313] The second legal criterion—asynchrony—likewise suggests that the U.S. Constitution is multi-textual, given that amendments have been enacted at various moments since 1789—first in 1791 with the Bill of Rights and most recently in 1992 with the Twenty-Seventh Amendment.[314] And the third legal criterion—shared supremacy—applies just as well to the U.S. Constitution, given that each of the amendments enjoys equal constitutional force both to themselves and to the founding constitutional text. Therefore, on each of these three

State. Id. § 106(b) note (Amendments). The ratification of the Bill of Rights was recorded by Thomas Jefferson, then Secretary of State, in a circular sent to the governors of each of the states in the Union on March 1, 1792. See E-mail from Jane Fitzgerald, Archivist, Nat'l Archives & Recs. Admin., to author (July 24, 2023, 2:06 PM) (on file with the *Virginia Law Review*).

311 1 U.S.C § 112.

312 See supra Section I.A.

313 U.S. Const. amend. XXI; see Proclamation No. 2065, 48 Stat. 1720–21 (1933).

314 U.S. Const. amend. XXVII.

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legal grounds, the form and operation of the U.S. Constitution suggest that we should treat it under law as multi-textual.

Still, although the U.S. Constitution satisfies this tripartite legal test, is there any competing reason why we should not treat it as multi-textual?

The U.S. Constitution does indeed check all three legal boxes for multi-textuality—multiplicity, asynchrony, and shared supremacy—but it fails the sociological test of public recognition as multi-textual because it is perceived across the land as a uni-textual constitution. There is no self-conscious shared understanding in the country that the Constitution is multi-textual. This tension between law and perception raises the question whether the legal form and operation of any constitution should be sufficient to define it as multi-textual. To state the question directly: Is there more to multi-textuality than its legal form as a collection of several constitutional texts of equal status, and its operation as a set of supreme documents of higher law?

One could argue that multi-textuality must entail a widely shared public recognition that the thing called "the constitution" exists as multiple disaggregated texts of equal and supreme constitutional status across the jurisdiction. The argument would continue: this public recognition of the constitution's multi-textuality must at a minimum be shared by those charged with enacting, executing, and interpreting laws in the constitutional order. Advocates of this view might also contend that this public recognition of the constitution as multi-textual should ideally extend beyond incumbents to the people's own perception and understanding of their constitution. Yet wherever one stands on whether multi-textuality is exclusively a legal inquiry into constitutional form and operation alone, or more broadly also a sociological inquiry into public recognition, it is undeniable that this non-legal factor—let us call it a self-perception of multi-textuality—is absent in the United States.

Identifying multi-textuality as a unique constitutional form now gives us a more precise vocabulary for the U.S. Constitution and the constitutions of the world. It has always been imprecise to define the U.S. Constitution simply as "a constitution." And it has always been imprecise moreover to refer to the U.S. Constitution even more specifically as a "written constitution." We know now that it is most accurate as a matter of law to call the U.S. Constitution multi-textual, even though as a matter of public perception it is uniformly regarded as uni-textual. This new terminology—the U.S. Constitution as multi-textual in law and uni-textual in perception—captures the legal reality of constitutional form and

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operation while recognizing the prevailing social and political consciousness Americans have of their own constitution and the world abroad has of it, too. Correctly distinguishing these two faces of the U.S. Constitution clarifies the nature of America's higher law and also forces a productive contrast with world constitutions that are multi-textual not only in their form and operation but also in their public recognition.

My objective in this Article—the first introduction to multi-textual constitutions—has been twofold. My principal purpose has been to bring to light a unique constitutional form that has gone unnoticed until now. I have explained what multi-textual constitutions are, how they are created, when they may be optimal, why they sometimes fail to succeed, and how they differ from uni-textual constitutions, their lead alternative.

My second purpose has been to plant the seeds of scholarly interest in multi-textual constitutions. There remains much to learn about their design and formation, about their operation and evolution, and about their relative strengths and weaknesses as compared to alternative constitutional forms. There are many open questions about multi-textual constitutions—each of them comparative and evaluative—that scholars in the community of comparative constitutionalism might help us answer in the near-term, drawing from perspectives in law, history, political science, and sociology. For one, how have multi-textual constitutions fared as compared to uni-textual constitutions in delivering the public goods we expect of constitutionalism? In addition, are there observable trends in the constitutional forms chosen by constitution-makers since the end of the Second World War? And are there, in the world today, uni-textual constitutions functionally operating as multi-textual, or multi-textual constitutions functionally operating as uni-textual, and does this reveal something important about the permeability, malleability, or fusion of formally distinguishable constitutional forms? My own research will probe these and related questions, and I hope others will join me in the search for a more complete understanding of the architecture and construction of the constitutions of the world.